(23,972)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 315.

THE GLENWOOD LIGHT AND WATER COMPANY, APPELLANT,

vs.

THE MUTUAL LIGHT, HEAT AND POWER COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 24, 1914.

1 Pleas in the District Court of the United States for the District of Colorado, Sitting at Denver.

Be It Remembered, that heretofore, and on, to-wit, the fifteenth day of November, A. D. 1912, came The Glenwood Light and Water Company by Charles S. Thomas, Esquire, William H. Bryant, Esquire, George L. Nye, Esquire, and William P. Malburn, Esquire, its creditors, and filed in said court its bill of complaint; and sued out of and under the seal of said court a subpœna in chancery against The Mutual Light, Heat and Power Company.

And the said bill of complaint is in words and figures, as follows, to-wit:

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States.

Bill in Equity.

To the Honorable Judge of the District Court of the United States in and for the District of Colorado:

The Glenwood Light and Water Company, a corporation organized and existing under the laws of the State of Nevada, and a citizen of the State of Nevada, brings this its bill against The Mutual Light, Heat and Power Company, a corporation organized and existing under the laws of the State of Colorado, and a citizen of the State of Colorado, and thereupon your orator complains and says:

2 I.

That your orator is now and at the time of bringing this bill, and at all times hereinafter named was, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and was at all said times and now is a citizen of the State of Nevada, and authorized, under and by virtue of compliance with the laws of the State of Colorado, to transact business in the said last named State.

II.

That the Mutual Light, Heat and Power Company is now, and at the time of bringing this bill, and at all times hereinafter named was, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, and was at all said times and now is a citizen of the State of Colorado.

III.

That this controversy is wholly between a citizen of the State of Nevada and a citizen of the State of Colorado, and that the amount

in controversy herein exceeds the sum of Three Thousand Dollars ($3000.00), exclusive of interest and costs.

IV.

Your orator, further complaining, alleges that on, to-wit, the 8th day of September, A. D. 1888, a certain corporation
3 known as and called The Glenwood Light and Water Company was organized under the laws of the State of Colorado, for the purpose of building, owning and operating a water and electric light and power plant and system in the Town of Glenwood Springs, in the State of Colorado, and that on, to-wit, the 10th day of September, A. D. 1888, it became the owner, by assignment, of a certain franchise and grant theretofore made by the Town of Glenwood Springs, on, to-wit, the 4th day of April A. D. 1887, to J. H. Devereux, and others, and by them assigned to The Glenwood Light and Power Company, and on or about the 10th day of September, A. D. 1888, by said company assigned to your orator, said franchise and grant being contained in an ordinance of said Town of Glenwood Springs known as Ordinance No. 66, entitled, "An Ordinance granting a franchise to J. H. Devereux, et al., to erect and maintain an electric and power plant within the limits of the Town of Glenwood Springs," the same being in words and figures, as follows, to-wit:

SECTION 1. That the right, power, privilege and franchise of erecting and maintaining an electric and power plant within the corporate limits of the Town of Glenwood Springs for the purpose of supplying said Town of Glenwood Springs and the inhabitants thereof with electric light and power, be, and the same is hereby granted to J. H. Devereux, David R. C. Brown, their asso-
4 ciates, successors and assigns, for the period of twenty years from January 1, 1887; such grant, however, shall not be construed as exclusive for the erection and maintenance of an electric light and power plant in said town, but said town reserves the right to grant a like franchise to any other person or corporation it may see fit—protecting, however, the property or the plant of the grantees herein from destruction by such other grantees.

SEC. 2. The poles of said plant to support the wires thereof shall be placed in the alleys of said town where practicable, and the erection thereof shall be under the supervision of the engineer of said town or other duly authorized officer, and the wires thereof supported by said poles shall be placed at a sufficient (*heighth*) from the ground so as not to interfere with the free and unobstructed use of all streets and alleys.

SEC. 3. The town reserves the right to cause the poles belonging to said plant to be changed, where necessary, for reasonable cause due to change of streets or alleys, or other good and sufficient reason, and also, to abate any nuisance which may exist in the running of the machinery of said plant.

SEC. 4. This ordinance shall be in force from and after its passage and publication according to law.

Passed by the Board of Trustees of the Town of Glenwood Springs, this 4th day of April, 1887.

W. E. SHAFFER, *Mayor.*

L. B. MOW, *Recorder.*

V.

That under and by virtue of the provisions of said ordinance said J. H. Devereux, David R. C. Brown, and their associates, and The Glenwood Light and Power Company, and your orator, did
5 construct a full, ample and complete electric light and power system in said Town of Glenwood Springs, for the purpose of supplying said town and the inhabitants thereof with electric light and power, and did erect poles and wires for the purpose of conveying electricity for light and power purposes in the alleys of said town where practicable in manner provided for in said ordinance, and continued to maintain the said poles and wires and to supply the said town of Glenwood Springs and the inhabitants thereof with electric light and power until to-wit, the first day of January, A. D. 1907.

VI.

And your orator further alleges that on, to-wit, the 14th day of February, A. D. 1905, the Board of Trustees of said Town of Glenwood Springs did enact an ordinance entitled:

An ordinance concerning the operation and maintenance of an electric power plant within the corporate limits of the Town of Glenwood Springs, Colorado, and granting to The Glenwood Light and Water Company, its successors and assigns, an extension or renewal of franchise for the same, and embodying herein a contract between said company and said Town concerning the use by said Town of electric power for electric lighting, and providing a schedule of prices to be charged for the use of power for the electric lighting by the inhabitants of said Town, which is in words and figures following, that is to say:

6 Whereas, by ordinance No. 66 of the general ordinances of the Town of Glenwood Springs, Colorado, dated April 4th, 1887, the rights and franchise for a period of twenty years from January 1st, 1887, was granted to J. H. Devereux and others, their successors and assigns, to erect and maintain an electric power plant within the corporate limits of the town of Glenwood Springs; and

Whereas, the Glenwood Light and Water Company, a corporation, organized under the laws of Colorado, is the successor and owner of the rights, privileges and franchises granted by said ordinance; and

Whereas, it is now mutually desired by said company to extend, or renew, the terms and provisions of said ordinance, subject to the modifications referred to in Section 2 hereof, for a period of twenty years from and after the expiration of the term granted by said ordinance No. 66; and

Whereas, the company is the assignee and owner of the franchises, rights and privileges granted to J. H. Devereux, and others, in and by ordinance No. 66, of the general ordinances of said town, entitled 'An Ordinance granting franchise to J. H. Devereux et al. to erect and maintain an electric power plant within the corporate limits of the town of Glenwood Springs,' passed by the Board of Trustees of said town April 4th, A. D. 1887; and

Whereas, the said J. H. Devereux et al. have erected and maintained, and said company is now maintaining, an electric and power plant within and adjacent to said town; and

Whereas, it is mutually desired to extend the period fixed by section 1 of said ordinance No. 66, beyond the limitation of the grant, rights, franchises and privileges therein referred to and provided for, and to extend and renew the same;

Now, therefore, be it ordained by the Board of Trustees of
7 the Town of Glenwood Springs, Colorado:

SECTION 1. That the Glenwood Light and Water Company, its successors and assigns, is hereby granted, subject to the provisions of Section 2 hereof, an extension, or renewal, of the franchises, rights and privileges contained in the several sections of ordinance No. 66 of the General Ordinances of the Town of Glenwood Springs, Colorado, as printed and published in 1890.

The extension, or renewal of the franchises, rights and privileges, as hereinabove granted, shall be for the term of twenty years and shall extend from January 1st, A. D. 1907, until the 1st day of January, A. D. 1927.

SECTION 2. That the grant contained in Section 1 of this ordinance is made in pursuance of a certain contract entered into between said town and said company hereinafter set out, and said contract and the ordinance therein referred to, together with this ordinance, shall constitute and define the rights, privileges and duties of said company, and shall be binding upon said town and said company, as an entire contract between them.

SECTION 3. The contract hereinabove referred to as being embodied herein, and which is renewed hereby, is in words and figures, following, to-wit:

It is agreed that the town will take lights from said company for the period of five years from and after the fourth day of April, A. D. 1905, and will pay for the same in accordance with the following schedule:

For the first ten all-night arc lights twelve dollars per month each.

For each additional all-night arc light over ten, six dollars per month each.

All incandescent and other lights used by the municipality to be charged for the same as to private consumers.

8 The company further agrees in consideration of the extension or renewal of the franchise, rights and privileges hereinabove referred to, to reduce its present light rate, except municipal, in accordance with the following schedule:

For residence lights not on meter, twenty per cent reduction.

Meters, minimum charge, to reduce from $3.00 and $2.00 to $2.00 and $1.00 per month. All meter rates to be reduced as follows:

Under 100,000 Watt hours, 12 cents per thousand, being a 20 per cent reduction; over 100,000 and under 200,000, 11¼ cents, 25 per cent reduction; over 200,000, 10 cents per thousand, 33 1/3 per cent reduction.

The enclosed arc or Nernst lamps suitable for the present circuit will be provided by the company at the option of the consumer.

The company further agrees to supply the lights for the new posts at the south end of the state bridge, equal in power to one arc light, free of charge during the period of the contract to furnish lights to the town, the town to supply the lamps and keep the same in repair.

The company further agrees to paint all poles and cross-arms within six months from the date of the extension or renewal of the franchise, rights and privileges hereinabove provided for.

The town hereby agrees that in its annual appropriation ordinance it will appropriate to its water and light fund sufficient of the revenues of the town to meet the outlay hereinabove contracted for.

SECTION 4. This ordinance shall take effect and be in force from and after its passage, approval and publication, according to law, and the written acceptance of the Glenwood Light and Water Company therein providing that it will agree to perform and abide by all the conditions, terms and provisions hereinabove men-
9 tioned.

Passed, approved and adopted this 14th day of February, A. D. 1905.

W. S. PARKINSON,
Mayor pro Tem.

Attest:
[SEAL.] A. J. DICKSON,
Clerk and Recorder.

VII.

And your orator, further complaining, alleges that on, to-wit, the 14th day of February, A. D. 1905, the said Light and Water Company did accept said ordinance, which said acceptance is in words and figures following, to-wit:

In consideration of the extension or renewal of the franchise, rights and privileges, provided for in an ordinance entitled, 'An ordinance concerning the operation and maintenance of an electric power plant within the corporate limits of the Town of Glenwood Springs, Colorado, and granting to the Glenwood Light and Water Company, its successors and assigns, an extension, or renewal, of franchise for the same, and embodying herein a contract between said company and said town concerning the use by said town of electric power for electric lighting, and providing a schedule of prices to be charged for the use of power for electric lighting by the inhabitants of said town,' passed, approved and adopted by the Board of Trustees of said town February 14th, 1905, The

Glenwood Light and Water Company of Glenwood Springs, Colorado, hereby accepts and agrees to abide by all the terms and conditions provided for in said ordinance, as well as all of the propositions, ordinances and agreements therein referred to.

Dated this 14th day of February, A. D. 1905.

10 THE GLENWOOD LIGHT AND POWER CO.,

[SEAL.] By H. A. LYLE,
Treasurer and General Manager.

THE GLENWOOD LIGHT AND WATER CO.,

[SEAL.] By R. J. BOLLES, *Vice-President.*

Attest:
WM. O'BRIEN, *Secretary.*

THE TOWN OF GLENWOOD SPRINGS,

[SEAL.] By W. S. PARKINSON, *Mayor pro Tem.*

Attest:
A. J. DICKSON,
Clerk and Recorder.

Whereby said franchise, with the modifications and changes therein contained, was extended and renewed by the said Town of Glenwood Springs for a period of twenty years from the first day of January, A. D. 1907, and thereby became and since has been a lawful and binding contract between the said town and said company and its successors and assigns.

VIII.

And your orator, further complaining, alleges that the said Glenwood Light and Water Company of Colorado was, by its charter and laws of said state, limited as to its period of existence to twenty years from and after the date of its said incorporation, and that on, to-wit, the 8th day of September, A. D. 1908, the said Glenwood Light and Water Company of Colorado expired by limitation by reason whereof, and by virtue of the statute in such case made and provided, its property, assets and franchise devolved upon

11 and vested in its Board of Directors as trustees thereof, who, as such trustees, under the statute aforesaid, held, possessed, administered and operated the same in the name of said company until, to-wit, the first day of November, A. D. 1909, when, all and singular, the said property, water rights, franchises, choses in action, and all bills receivable and accounts payable of the said Glenwood Light and Water Company of Colorado, were, by the trustees aforesaid, conveyed, transferred, set over, assigned and delivered to your orator, since which time your orator, as the successor and assignee of said Company, has been in the full possession, enjoyment, control and ownership of the said premises, property, rights and obligations, and as such owner thereof has continuously

supplied electric current for lights and power to the said defendant and the inhabitants thereof, except as hereinafter stated, in all respects as required and provided in and by the said renewal and extension of said franchise.

IX.

And your orator, further complaining, alleges that on, to-wit, the 18th day of October, A. D. 1909, the said town of Glenwood Springs, by its Board of Trustees, assumed to enact an ordinance repealing, revoking, cancelling, rescinding and setting aside that certain ordinance hereinabove set forth of February 14th,
12 1905, granting to The Glenwood Light and Water Company an extension or renewal of franchise for the operation and maintenance of an electric power plant within the corporate limits of the Town of Glenwood Springs, Colorado, which said repealing ordinance is in words and figures following, that is to say:

Whereas, an alleged ordinance known as "An Ordinance concerning the operation and maintenance of an electric power plant within the corporate limits of the Town of Glenwood Springs, Colorado, and granting to The Glenwood Light and Water Company, its successors and assigns, an extension or renewal of franchise for the same, and embodying herein a contract between said company and said town concerning the use by said town of electric power for electric lighting and providing a schedule of prices to be charged for the use of power for electric lighting by the inhabitants of said town," purports upon records of said town, to have been passed and adopted by the Board of Trustees of said town on February 14th, A. D. 1905, and,

Whereas, the statutes of the State of Colorado, in force at said time prohibited the passage or adoption of said ordinance until a majority of the voters of said Glenwood Springs who were taxpayers under the law had first voted to approve the same at a general or special election, and

Whereas, said ordinance or the matters therein contained were never approved by a majority of the voters of said Glenwood Springs who were taxpayers under the law at any election either general or special by reason whereof the Board of Trustes of said Glenwood Springs was without power or authority to pass or adopt said ordinance and the same was and is null and void,

Now, therefore, be it ordained by the Board of Trustees of the Town of Glenwood Springs, Colorado, that that certain al-
13 leged ordinance known as 'An Ordinance concerning the operation and maintenance of an electric power plant within the corporate limits of the town of Glenwood Springs, Colorado, and granting to The Glenwood Light and Water Company, its successors and assigns an extension or renewal of franchise for the same embodying herein a contract betwen said company and said town concerning the use by said town of electric power for electric lighting and providing a schedule of prices to be charged for the use of power for electric lighting by the inhabitants of said town," purporting to have been passed and adopted by the Board of Trustees

of said Town on February 14th, A. D. 1905, be and the same is hereby repealed, revoked, cancelled, rescinded and set aside, and all rights or privileges, claimed by, through or under said alleged ordinance by the said Glenwood Light and Water Company be and the same are hereby cancelled, revoked and terminated.

Passed, approved and adopted this 18th day of October, A. D. 1909.

[SEAL.] E. E. DRACH, *Mayor.*

Attest:
GEO. J. KENDRICK,
Clerk and Recorder.

X.

And your orator further alleges that the said Town was wholly without the power or authority, either through or by its Board of Trustees or otherwise, to repeal, set aside, modify, change or impair its said ordinance of the 14th day of February, A. D. 1905, and that the assumed and pretended action of the said Town, through its Board of Trustees as aforesaid, in attempting to repeal and set aside the said ordinance, was and is ultra vires and
14 wholly void and of no effect whatsoever; that notwithstanding said pretended repeal of said ordinance the said town since, as well as before, the passage thereof, observed the conditions, terms and requirements of the same, and each of them, both as to the service given by your orator thereunder and as to the compensation to it for such service.

XI.

And your orator further complaining, alleges that, notwithstanding the said ordinance assuming and pretending to repeal the renewal franchise granted to The Glenwood Light and Water Company, your orator has at all times continued to carry on its business in the said town of Glenwood Springs, and to supply the inhabitants of said town with electric current for light and power purposes, and to supply the said town with electric current for lighting purposes, until the contract hereinafter set forth was made by and between the said town and the defendant company, and that it still continues to maintain its poles and wires in the streets and alleys of said town.

XII.

And your orator, further complaining, alleges that on, to-wit, the 17th day of February, A. D. 1909, the defendant, The Mutual Light, Heat and Power Company, was incorporated under the
15 laws of the State of Colorado, and that during the latter part of the year 1910 the Board of Trustees of the said Town was petitioned by said company to grant to it a franchise for the purpose of supplying electric light and power to the said Town and the inhabitants thereof, and that the said application was afterwards withdrawn. That in the month of March, A. D. 1911, another peti-

tion was presented by the said defendant to the Board of Trustees of the Town of Glenwood Springs, asking for a franchise, and that an ordinance was attempted to be enacted by the said Board, assuming to grant to the said defendant the right to erect a plant in the Town of Glenwood Springs and to construct a system for the purpose of furnishing the Town and the inhabitants thereof with electric current for light and power purposes, and the said alleged ordinance was attempted to be subjected to a vote of the taxpaying electors at an election held in the said Town on the 4th day of April, A. D. 1911, and the vote cast at the said election was announced to be one hundred and twenty (120) in favor of the ordinance and ninety-seven (97) against, the said ordinance being in words and figures as follows, to-wit:

An Ordinance granting to The Mutual Light, Heat and Power Company of Glenwood Springs, Garfield County, Colorado, a corporation duly organized and existing under and by virtue
16 of the laws of the State of Colorado, its legal representatives, successors or assigns, the right to generate within, and to furnish and to distribute electrical energy to the Town of Glenwood Springs, Garfield County, Colorado, and to the inhabitants thereof; and to erect, maintain and operate such plants, distributing stations, poles, wires, pipe lines, conduits and appliances as may be necessary for the proper conduct of its business of furnishing and distributing electrical energy.

Be it ordained, by the Board of Trustees of the Town of Glenwood Springs, Garfield County, Colorado:

SECTION 1. That from and after the date of the passage of this ordinance, subject to the conditions hereinafter provided, The Mutual Light, Heat and Power Company of Glenwood Springs, Garfield County, Colorado, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, hereinafter called the Power Company, its legal representatives, successors or assigns, be and the same is hereby granted the right, privilege and authority, to establish, construct, maintain, operate and own, within said Town of Glenwood Springs and any and all additions hereafter made thereto all works necessary to the business of furnishing electrical energy for light, heat and power or other useful purpose, to the said Town of Glenwood Springs and to the inhabitants thereof, also the right, privilege and authority to maintain such distributing stations as may be needful or desirable for the generating and supplying of such electrical current or energy; also the right and authority to distribute, supply and sell, electrical current for light, heat power and other useful purpose to all persons associations or corporations residing or doing business within said Town of Glenwood Springs, upon payment as hereinafter provided by such persons, associations or corporations at a rate which shall not be in excess of the maximum rates hereinafter referred to.

17 SECTION 2. For the proper exercise of the rights, privileges, license and franchise in Section 1 of this Ordinance granted to said Power Company, its legal representatives, successors or as-

signs, the further right, privilege and authority is hereby granted said Power Company, its legal representatives successors or assigns, to enter upon for the purpose of constructing and maintaining and to construct, maintain and operate over, along and under all of the streets, alleys, parks and public grounds of said Town of Glenwood Springs, and additions, all necessary poles, wires and electrical apparatus, and all approved and proper electrical conductors, and to excavate and lay all necessary pipes, conduits and appliances under such streets, alleys, parks and other public places within the limits of said Town of Glenwood Springs, for the purposes herein referred to and covered by the grants herein made; the said Power Company to possess all the rights, privileges and franchises necessary for the successful operation of its business of manufacturing, distributing and selling of electrical energy for light, heat, power and other useful purpose to said town of Glenwood Springs and additions, and to the inhabitants thereof; provided however, that no right, privilege or authority granted herein shall be so construed as to in any manner interfere with the convenience or with any one or more of the rights or privileges belonging to the public, in and to the streets, alleys, parks or public grounds now existing in said Town of Glenwood Springs, or which may hereafter be included therein, during the life of this franchse.

SECTION 3. That the right of way over the streets, alleys, parks and other public places in said Town of Glenwood Springs, and the excavations therein necessary to be made, shall at all times be subject to such lawful and reasonable ordinances and public regulations as now are, or may hereafter be, lawfully adopted by said Town; and said Power Company, its legal representatives, successors or
18 assigns, shall at its own expense repair, any and all places entered upon by it for the purposes herein mentioned, and shall properly protect all such excavations and works, restoring all such public places to as good condition as before such excavations or works were begun, and shall remove all debris resulting from such use and occupation, and shall be responsible for any and all damage to the streets, property or persons resulting from negligence on the part of said Power Company, its legal representatives, successors or assigns, or its employees in doing such excavation or work.

SECTION 4. Said Power Company, its legal representatives, successors or assigns, shall at all times furnish an adequate supply of electrical current or energy for light heat and power as herein provided, to the said Town of Glenwood Springs and additions, and to the inhabitants thereof, unless prevented from so doing by unavoidable accident, at prices not to exceed the following schedule, to-wit:

For the Town of Glenwood Springs.

Arc Lights of 2000 candle power, $6.00 per month, per light.

Incandescent Lights, per 16 candle power, 3¢ per light, per night.

For the Inhabitants.

For 200,000 Watt Hours and over.....7¢ per 1000.
For 100,000 up to 200,000 Watt Hours.....8¢ per 1000.
All amounts under 100,000 Watt Hours.....9¢ per 1000.

Minimum meter rate to be $1.50 per month for the last twelve months, and $1.00 per month thereafter.

For residence lights not on meter, 50¢ per light, per month.

SECTION 5. Said Power Company, its legal representatives, successors or assigns, shall at all times be prepared to supply to said town of Glenwood Springs and additions and to the inhabitants thereof, electric light, heat and power for all needful purposes during the entire twenty-four hours of each day during the life of this franchise.

SECTION 6. Said power Company, its legal representatives, successors or assigns, shall, within a reasonable time after the passage of this ordinance, according to law, commence the construction of its electric light, heat and power system and shall be ready to furnish electric light, heat and power to said Town of Glenwood Springs and additions, and to the inhabitants thereof, within eighteen months from and after the date of the passage of this ordinance, unless prevented by unavoidable delay or accident, and should said Power Company, its legal representatives, successors or assigns, fail to furnish said light, heat and power as aforesaid or be ready to furnish the same, within twenty-four months from and after the passage of this ordinance, then this franchise to become null and void and to be of no force or effect, unless the Board of Trustees of the Town of Glenwood Springs shall grant further time.

SECTION 7. Said Power Company, its legal representatives, successors or assigns, are hereby granted the right, power and privilege to make and establish such reasonable rules and regulations concerning the furnishing of electric current for light, heat, power and other useful purpose, as are necessary in the proper conduct of its business, such rules and regulations, however, to be conformable to the law and not inconsistent with the provisions of this ordinance.

SECTION 8. All amounts that shall become due to said Power Company, its legal representatives, successors or assigns, for the use, furnishing or consumption of electrical current for light, heat, power or other purpose, shall fall due on the last day of the month during which such service was rendered; and in case of the neglect or refusal on the part of any consumer to pay the established and existing rates, not in excess of the schedule herein contained, within the prescribed time for such payment, then said Power Company, its legal representatives, successors or assigns, after due notice, shall have power to enter upon the premises of any such consumer and forthwith remove the meter or meters or any other apparatus or materials therein or thereupon placed, belonging to said Power Company, its successors or assigns, and to forthwith disconnect its service and shut off all supply to such consumer, until

all amounts due said Power Company, its successors or assigns, by such consumer, shall be paid.

SECTION 9. Before entering upon any of the streets, alleys, parks or public places in said Town of Glenwood Springs, for the purposes aforesaid, the said Power Company, its legal representatives, successors or assigns, shall file with the Clerk of said Town of Glenwood Springs, an acceptance in writing of the terms and conditions of this ordinance.

SECTION 10. Before entering upon the enjoyment of any one or more of the rights, privileges or franchises herein granted, said Power Company, its legal representatives, successors or assigns, shall file with the Clerk of said Town of Glenwood Springs, a good and sufficient bond to be approved by the Board of Trustees of said Town, in the penal sum of Five Thousand Dollars ($5,000.00) and in favor of said Town of Glenwood Springs, and which bond shall be renewed from time to time as directed by said Board of Trustees, the condition of said bond being that said Power Company, its legal representatives, successors or assigns, shall save, keep harmless and indemnify said Town of Glenwood Springs from any and all damages or suit for damages, arising from negligence or lack of due care being exercised by said Power Company, its legal representatives, successors or assigns, or employees, in the construction, maintenance or operation of its electric light, heat and power system or any part thereof, in said Town of Glenwood Springs or additions thereto, and that said Power Company, its legal representatives, successors or assigns, shall save and keep harmless said Town of
21 Glenwood Springs from any and all damages or suits for damages by reason of the exercise of the franchise hereby granted.

SECTION 11. The Town of Glenwood Springs shall. at all times, have the right and power to purchase or condemn said power plant and appurtenances at its actual cash value, and at a price excluding all value of the franchise or right of way through the streets, alleys and other public places in said Town, and also excluding all value by virtue of any contract entered into with said town. In case said Town elects to purchase said power plant, as in this section above referred to, said Town shall give said Power Company, or its legal representatives, successors or assigns, not less than sixty (60) days' notice of such its intention to purchase. The value of said plant shall be determined by a Board of three appraisers, the first member of which shall be selected by the Board of Trustees of said Town of Glenwood Springs, the second member of which shall be selected by the Board of Directors of said Power Company, and the third member of which shall be selected by the two members chosen as herein specified. And the value so determined upon by said Board of Appraisers shall be submitted to the qualified taxpaying electors of said Town for their approval and confirmation, before becoming effective. And any refusal or failure on the part of the said Power Company, its legal representatives, successors or assigns, to comply with the conditions of this section in the matter of appointing an appraiser, as herein provided by such Power Com-

pany to be appointed, shall be deemed and considered as a forfeiture on the part of said Power Company, its legal representatives, successors or assigns, of the rights, privileges and franchise by this ordinance granted.

SECTION 12. The said Town of Glenwood Springs, shall, at all times have the right and authority by it hereby reserved, to take over and operate under lease for and during such term or
22 period of years at it in its own discretion, may elect and at an annual rental charge not to exceed ten (10) per cent of the appraised value of the said plant at the time of taking over of said plant by said town under the terms herein specified. It shall be the duty of said town, operating said plant under the terms and conditioned contained in this section, to at all times keep said plant in as good repair as at the time of commencing operation under said lease, unavoidable accidents and ordinary wear and tear excepted. The value of said plant shall be determined by a board of three appraisers, the first member of which shall be selected by the Board of Trustees of said town of Glenwood Springs, the second member of which shall be selected by the Board of Directors of said Power Company, and the third member of which shall be selected by the two members chosen as herein specified. The report of such Board of Appraisers, touching the value of said plant, shall constitute and be the value upon which rental by said town shall be based, such rental being payable to said Power Company in quarterly payments. Said Town, through its Board of Trustees, shall, however, give to said Power Company, its legal representatives, successors or assigns, not less than sixty (60) days' written notice of such its intention to lease and operate said power plant as above provided, and likewise said town shall give said Power Company, its legal representatives, successors or assigns, not less than sixty days' written notice of its intention to discontinue operation of said plant under said lease. Any refusal or failure on the part of the said power company, its legal representatives, successors or assigns, to comply with the conditions of this section in the matter of appointing an appraiser as herein provided by said Power Company to be appointed, shall be deemed and considered as a forfeiture on the part of said Power Company, its legal representatives, successors or assigns, of the rights, privileges and franchise by this ordinance granted.

23 SECTION 13. This grant shall be and remain in full force and effect for the period of twenty years from and after the tenth day of April A. D. 1911; Provided, however, that nothing herein contained shall be construed as being an exclusive right or franchise.

SECTION 14. This Ordinance, after its passage, shall be recorded in a book kept for that purpose to be authenticated by the signature of the Mayor and Clerk of said Town of Glenwood Springs, and shall be published as is required by law, in the Daily Avalanche, a lawful newspaper published in said town of Glenwood Springs, and shall take effect and be in full force in the manner prescribed by law.

Published by order of the Mayor and Board of Trustees of the Town of Glenwood Springs, Colorado.

(Signed) E. E. DRACH, *Mayor.*

Attest:

(Signed) WILLIAM CROSS,

[SEAL.] *Clerk and Recorder pro Tem.*

STATE OF COLORADO,
County of Garfield, ss:

I, William Cross, Clerk pro tem of the Town of Glenwood Springs, Garfield County, Colorado, do hereby certify that the above and foregoing ordinance of said town was read twice in full, once at the time of its introduction, and again before the question of its passage was voted upon; that the first reading of said ordinance was had at the regular meeting of the Board of Trustees of said Town specified in notice of application to apply for said ordinance; that thereupon, at a recess meeting of such meeting named in said notice, the said Board of Trustees of said Town ordered that the question of the adoption of said Ordinance be submitted to the qualified taxpaying electors of said Town to be by them voted upon on the 4th day of April A. D. 1911; that the said question was submitted to the qualified tax-paying electors of said town; that the canvassed vote cast on said question was: 120 votes in favor of the passage of said Ordinance and 97 votes against the passage of said Ordinance; that prior to the first reading aforesaid of said ordinance, publisher's affidavit of such publication of said notice of application was duly filed with the Board of Trustees of said Town; that said Ordinance was, following the first reading thereof by said Board of Trustees of said Town ordered published daily for the period of two weeks in the Daily Avalanche, a legal daily newspaper published in said town; and that said Ordinance was duly published daily in the said Daily Avalanche, in pursuance of said order aforesaid, the first publication thereof being on the 21st day of March A. D. 1911, and the last publication thereof being on the 3rd day of April A. D. 1911.

24

Given under my hand and the seal of the said Town of Glenwood Springs, Colorado, this 11th day of April A. D. 1911.

(Signed) WM. CROSS,

[SEAL.] *Clerk pro Tem.*

Passed and approved this 10th day of April, A. D. 1911, by the Board of Trustees of the Town of Glenwood Springs, Garfield County, Colorado.

(Signed) E. E. DRACH, *Mayor.*

Attest:

(Signed) WM. CROSS,

SEAL.] *Clerk pro Tem.*

XIII.

And your orator, further complaining, alleges that thereafter, and on, to-wit, the 22nd day of September, A. D. 1911, a contract or agreement was entered into by and between the Town of Glenwood Springs and The Mutual Light, Heat and Power Company,
25 whereby the said Company agreed to supply electric lighting for the streets, alleys, and other public places within the said Town, for the term of ten years, the said contract being in words and figures as follows, to-wit:

Contract Agreement for Lighting the Streets, Alleys and Other Public Places of the Town of Glenwood Springs, Colorado.

This Memoranda of Agreement Made and entered into by and between the Town of Glenwood Springs, Colorado, and The Mutual Light, Heat & Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado,

Witnesseth, That, Whereas, on the 14th day of August, A. D. 1911, the said Town of Glenwood Springs, Colorado, did, by virtue of an order made and entered by its Board of Trustees, authorize an advertisement for bids for lighting the streets, alleys and other public places within the said Town of Glenwood Springs, which advertisement was published in the Daily Avalanche, a legal daily newspaper published in said Town, and, the said, The Mutual Light, Heat & Power Company, having filed its bid or bids in pursuance and compliance with said advertisement, was found, by said Board of Trustees, to be the lowest and best bidder for such street, alley and other lighting.

Now, therefore, It is agreed by and between the Town of Glenwood Springs, and The Mutual Light, Heat & Power Company, the respective parties hereto, as follows:

First. That the said Town of Glenwood Springs, Colorado, in consideration of a reduction in prices as stated in a certain franchise granted to the said The Mutual Light, Heat & Power Company, designated as Ordinance Number Two (2) of the Series of 1911, hereby grants to the said The Mutual Light, Heat & Power
26 Company, a contract, extending for the period of ten (10) years from and after the date hereof, the electric plant of said Company being ready for service on or before the 1st day of April, A. D. 1912, this contract being subject to all rights and reservations to the said Town as specified in the franchise granted by ordinance to the said The Mutual Light, Heat & Power Company designated as Ordinance Number Two (2) of the Series of 1911, and subject also, to the conditions hereinafter mentioned.

Second. In consideration of the franchise hereinbefore mentioned and the sum of One Dollar ($1.00) in hand paid by the said Town of Glenwood Springs, to the said The Mutual Light, Heat & Power Company, the receipt of which is hereby acknowledged, the said The Mutual Light, Heat & Power Company hereby agrees to supply electric lighting for the streets, alleys and other public places within

said Town of Glenwood Springs, Colorado, the said Town hereby reserving the right to superintend and regulate the placing of said lights,—in manner and prices following:

Any number of street lamps of up-to-date pattern, the same being (or equivalent to) the 7.5 Ampere, Series, alternating current, enclosed arc lamps operated at an average Wattage of 487 Watts per lamp per hour at lamp-terminal, at a price of Five Dollars and Fifty Cents ($5.50) per lamp per month.

Also any number of 75-Watt (60-candle power) Series Tungsten lamps, at a price of Two Dollars ($2.00) per lamp per month, the understanding being that if Two Hundred (200) or more of such lamps are used, the rate for the first Two Hundred (200) only, shall be One Dollar and Twenty Cents ($1.20) per lamp per month, and all additional lamps of the above named kind and character shall be charged for at the rate of Two Dollars ($2.00) each per lamp per month. All Tungsten lamps of standard sizes other than
27 the above mentioned 75-Watt (60-candle power) Series Tungsten lamps shall be charged for at the following rates each per month, viz: 32-candle power (40-Watt), $1.07; 80-candle power (100-Watt), $3.33; and 200-candle power (250-Watt), $6.67.

It is agreed that the revenue to the Company under this contract, shall not be less than Two Hundred and Forty Dollars ($240.00) per month, subject to any deduction that may be made in consequence of defective service, and that all lamps operating under a less Wattage than herein specified shall be subject to a proportionate reduction in price per month.

All 16-candle power incandescent lamps used by said Town shall be paid for at the rate of Three cents (3¢) per light per night; all other incandescent lights used by said Town of either greater or less candle power shall be charged for at the same proportionate rate per candle-power as in this paragraph specified for said 16-candle power incandescent lamps.

All street lighting shall be from twilight to dawn of each and every day during the life of this contract, and payment for such service shall be due and payable to said Company monthly.

The said The Mutual Light, Heat & Power Company shall furnish a bond in the penal sum of Five Thousand Dollars ($5000.00) subject to the approval of the said Board of Trustees of said Town, or in lieu thereof, shall deposit a certified check in the sum of Five Thousand Dollars ($5,000.00) as a guarantee of faithful performance of this contract.

It is hereby expressly understood and agreed on the part of said Company, that the street lighting system of said Company, shall, at all times during the life of this contract, be kept in good and perfect repair, and that said Company shall, at its own expense make all necessary renewals.

Witness our hands and seals this 22nd day of September,
28 A. D. 1911.

THE TOWN OF GLENWOOD SPRINGS,
By E. E. DRACH, *Mayor.*

Attest:
[SEAL.] JOHN VORIES,
Clerk of said Town.

THE MUTUAL LIGHT, HEAT &
POWER COMPANY,
By GEO. EDINGER, *President.*

Attest:
[SEAL.] CHAS. H. KING,
Secretary of said Company.

XIV.

And your orator, further complaining, says that The Mutual Light, Heat and Power Company commenced the construction of its plant during the month of March A. D. 1912, and commenced furnishing light to the Town of Glenwood Springs under the said contract or agreement of September 22nd, 1911, on or about the first day of October, 1912, since which date its wires have been used for carrying electric current for the purpose of lighting the Town of Glenwood Springs and furnishing light to some of the inhabitants thereof.

XV.

That the poles belonging to the system of your orator and used for the purpose of carrying the wires through which runs
29 the electric current used for furnishing light and power to the town of Glenwood Springs and the inhabitants thereof within the limits of the town of Glenwood Springs, were erected, so far as practicable, in the alleys of said town, as was provided in the original ordinance granted to J. H. Devereux, David R. C. Brown and their associates, the franchise contained in said ordinance being afterwards assigned by the grantees to The Glenwood Light and Power Company, and by it to your orator, as is hereinbefore recited, and that the wires of your orator are strung on said poles and connected with the premises of its customers in accordance with the terms of its franchise and the rules and regulations of the town of Glenwood Springs.

XVI.

And your orator, further complaining, alleges that defendant, notwithstanding that its franchise granted it the right to erect its poles and string its wires along all of the streets and alleys of said town and that the defendant has erected poles in the streets of said town which support the lamps used to light the streets under the aforesaid contract, and that the streets of said town are very wide and unoccupied by any other poles but the said poles of the defendant, yet it has erected its poles and strung its wires princi-
30 pally in the alleys of said town, and particularly in the alleys occupied by the poles and wires of your orator, and, with the exception of a few blocks in one alley, has erected its poles and strung its wires on the same side of the alleys as that used and oc-

cupied by the poles and wires of your orator, as your orator is informed and believes, maliciously and for the purpose and with the intent of interfering with and harassing your orator, notwithstanding the fact, well known to defendant and to electrical engineers and constructors, as well as to insurance men and to the public generally, that such method is improper and dangerous and that it would interfere with the operation of the plant of your orator and would injure its property; that approximately one hundred and fifty (150) poles have been erected by defendant, of which not less than one hundred (100) are erected on the same side of the alleys on which are erected the poles and wires of your orator, and in addition thereto the said defendant has erected its poles and strung its wires on one of the streets of said town on which your orator has erected its poles and strung its wires, and on the same side of the street, there being eighteen (18) of defendant's poles with wires of said defendant on the same side of the street as the poles and wires of your orator.

XVII.

31 That the poles erected and used by your orator are of good material and the size usually employed for the same purpose in towns and cities approximating the size of the town of Glenwood Springs, but that the poles erected and used by defendant are much smaller in circumference and about six feet shorter than the poles of your orator. That on account of the narrowness of the alleys the poles of defendant have been set by it necessarily on practically the same line as the poles of your orator; that defendant uses in stringing its wires a system of cross-arms attached to its said poles. That by reason of its shorter poles and its system of cross-arms the wires of defendant are brought immediately below and in such close proximity to the wires of your orator, and close to and on either side of the poles of your orator, in such manner as to make the maintenance and operation by your orator thereof extremely difficult as well as dangerous to the property of your orator and its customers and employees. That the maintenance and operation of defendant's wries as aforesaid increases the possibility and probability of damage by fire caused by short circuits to the property of your orator and its customers, and creates and maintains a danger, hazard and constant menace to the safety and lives of the customers of your orator and of its linemen and other employees, who
32 in the discharge of their duties are frequently required to climb its poles, thus being required, so long as defendant continues to maintain its wires as aforesaid, to pass through and between its wires carrying a high voltage of electrical current, sufficient to kill any person coming in contact therewith.

Your orator further alleges that, as the wires of defendant are now strung and maintained by it, it is practically impossible for a lineman or other person to climb the poles belonging to your orator for the purpose of making repairs thereto or connections therewith without coming in contact with the high tension wires of defendant, thus producing a constant menace to the safety and lives of such employees of your orator, and requiring the exercise of

unusual and extraordinary precautions, and the loss of time and consequent additional expense, which, without such maintenance of said wires by defendant, would be unnecessary, and which unusual and extraordinary precautions cause great and injurious delays, hindrances and obstructions to your orator in the maintenance of its wires and system and in its service to its customers.

XVIII.

Your orator, further complaining, says that so long as the poles and wires of defendant are permitted to remain where they
33 are, in such close proximity to the poles and wires of your orator, your orator will be at a great and continuous additional expense in operating its system on account of the additional precautions required to be taken to protect the safety and lives of its customers and of its linemen and other employees, its own plant and the property of its customers from the danger of fire through short-circuiting, caused by the wires of the said defendant coming in contact with those of your orator. Your orator further says that, in spite of any and all precautions possible to be taken by your orator to protect its customers and its linemen and other employees from danger, no absolute protection can be assured while defendant continues to maintain its poles and wires as aforesaid, and your orator is liable to be subjected to many suits on account of injuries to its employees and customers, and will be required to incur additional and large and unusual expense on account of physicians' and hospital services rendered to such of its employees as may become injured. And your orator further alleges that it is and constantly will continue to be threatened, so long as defendant so maintains its poles and wires as aforesaid, with liability in case of injuries to persons and property caused by the maintenance by defendant of its wires and electric current in such close
34 proximity to the wires and current of your orator as to make dangerous the operation thereof, and which liability, together with the other liability hereinbefore referred to, will continue so long as the poles and wires of defendant are permitted to remain as they now are.

XIX.

And your orator further complaining, says that its business is increasing and more wires are being constantly required to supply the wants of its customers, and this will require in time the setting of cross-bars on the poles, below the cross-bars now in use, whereby the wires belonging to your orator will be brought much closer to the wires belonging to defendant than they are at present and thereby greatly increasing the danger and expense and the probability of injuries to your orator and its employees and its customers as aforesaid.

XX.

And your orator, further complaining, says that the value of its electric light and power plant is One Hundred and Fifty Thousand

Dollars ($150,000.00), and that the damage caused to your orator and its business and property, and to its right to maintain its poles and wires without interference or injury in the alleys and streets of the Town of Glenwood Springs, where the poles and wires
35 of defendant have been constructed in such close proximity to the poles and wires of your orator as aforesaid, is largely in excess of the sum of Three Thousand Dollars ($3,000.00), and that the value of the poles and wires of defendant in the said streets and alleys exceeds the sum of Three Thousand Dollars ($3,000.00).

XXI.

Your orator, further complaining, alleges and says that by reason of the number of its customers whose premises are connected with the wires of its system, by reason of the number of different buildings with which your orator's electric light and power system is connected, by reason of the number of poles belonging to your orator and the extent of its wires interfered with by the poles and wires of defendant, as hereinbefore alleged and set forth, and by reason of the number of employees of your orator whose duties require them frequently to ascend the poles belonging to your orator, the instances in which your orator may be subjected to actions at law for damages for injuries to person and to property are greatly increased in number and in magnitude, and your orator is now subjected to and will, so long as the conditions created by defendant and herein complained of are suffered to exist, continue to
36 be subjected to numerous liabilities and actions at law for damages arising out of such conditions created by the acts of defendant as aforesaid, and that by reason thereof and because of the numerous liabilities and actions at law arising and to arise, threatened and to be threatened, as well as by reason of all matters and things hereinbefore alleged and set forth, your orator has no plain, speedy and adequate remedy at law in the premises.

To the end therefore that your orator may have that relief which it can only obtain in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof expressly waived by your orator, it now prays the Court:

That an injunction may be issued against the defendant The Mutual Light, Heat and Power Company, enjoining it, its agents, servants, attorneys, employees, successors and assigns, perpetually, from maintaining its poles and wires on the same side of the alleys and streets in the Town of Glenwood Springs as those occupied by the poles and wires of your orator, and from maintaining its poles and wires in such close proximity to the poles and wires of your orator as to injure or endanger the property of your orator and its customers, and the safety and lives of the customers of your
37 orator and of its employees, and to cause your orator great expense and annoyance and inconvenience in maintaining, operating and repairing its electric light system in the said Town of Glenwood Springs; and that your orator may have such further and

other relief in the premises as the nature of the circumstances of the case may require.

May it please Your Honor to grant unto your orator a writ of subpœna of the United States of America, to be directed to the said defendant, The Mutual Light, Heat and Power Company, thereby commanding it at a certain time, and under a certain penalty therein to be specified, to appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises and to stand, perform and abide by such order, direction and decree as may be made against it in the premises, as to Your Honor may seem fit.

And your orator will ever pray.

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
GEORGE L. NYE,
WILLIAM P. MALBURN,
Solicitors for Complainant.

(Endorsed:) No. 6022. In the United States District Court of the District of Colorado. The Glenwood Light and Water Company, a corporation, Complainant versus The Mutual Light, Heat and Power Company, a corporation, Defendant. Bill in Equity
38 Filed Nov. 15 1912. Charles W. Bishop Clerk, Thomas, Bryant, Nye & Malburn Attorneys for Complainant, 621-629 Ernest and Cranmer Bldg. Denver, Colo.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States.

In Equity.

THE GLENWOOD LIGHT & WATER COMPANY, Plaintiff,
vs.
THE MUTUAL LIGHT, HEAT & POWER COMPANY, Defendant.

Answer of Defendant.

This defendant reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill of complaint, comes and answers thereto or to so much thereof as defendant is advised is material to be answered, and says:

1. That the bill of complaint filed herein by plaintiff does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts stated sufficient to entitle plaintiff to any relief against this defendant.

39 2. That plaintiff's bill of complaint does not state facts sufficient to give this court jurisdiction of the subject matter of this suit.

3. And further answering, defendant says that this court has not

jurisdiction of the subject matter of this suit for this, that the matter in controversy does not exceed in value the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs and alleges that the value of the matter in controversy is not more than the sum of Five Hundred Dollars ($500.00).

4. And further answering, defendant says that as to whether plaintiff is a corporation, organized and existing under the laws of the State of Nevada and whether or not plaintiff is a citizen of the State of Nevada, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief. Defendant therefore denies the same.

5. Defendant admits that it is a corporation, organized and existing under the laws of the State of Colorado and that it is a citizen of the State of Colorado.

6. Defendant denies that the amount in controversy herein exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs and alleges that such value does not exceed the
40 sum of Five Hundred Dollars ($500.00).

7. Defendant admits that a corporation, known and called The Glenwood Light & Water Company, was organized under the laws of the State of Colorado on or about the 8th day of September, A. D. 1888, but as to whether said corporation became the owner of, by assignment or otherwise, *of* a certain franchise and grant made by the Town of Glenwood Springs, on the 4th day of April 1887, to J. H. Devereux and others, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief. It therefore denies the same.

8. As to whether or not J. H. Devereux and others assigned to the Glenwood Light & Power Company, on or about September 10th A. D. 1888, or at any other time, the franchise and grant contained in an ordinance of the Town of Glenwood Springs, known as Ordinance #66, entitled, "An Ordinance granting a franchise to J. H. Devereux et al. to erect and maintain an electric and power plant within the limits of the town of Glenwood Springs," the defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief. It therefore denies the same.

9. Defendant admits that an electric light and power system was constructed in the town of Glenwood Springs, but whether
41 said system was constructed by J. H. Devereux, David R. C. Brown and other associates and the Glenwood Light & Power Company and the plaintiff, or by either or any of them, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

10. Defendant denies that on the 14th day of February, A. D. 1905, or on any other day, that the Board of Trustees of the Town of Glenwood Springs, enacted an ordinance entitled, "An Ordinance concerning the operation and maintenance of an electric power plant within the corporate limits of the town of Glenwood Springs, Colorado, and granting to The Glenwood Light & Water Company, its successors and assigns, an extension or renewal, of franchise for the same, and embodying herein a contract between said company and

said Town concerning the use by said Town of electric power for electric lighting, and providing a schedule of prices to be charged for the use of power for the electric lighting by the inhabitants of said Town."

11. Defendant alleges that no such ordinance as that set forth and alleged in Par. 6. of Plaintiff's bill of complaint was ever enacted or adopted by the Board of Trustees of the town of Glenwood Springs. That no such ordinance was ever submitted to the vote of the qualified tax paying electors of said town, or was ever
42 authorized by any vote of said tax paying electors. That no such ordinance as that set forth in Par. 6. in plaintiff's bill of complaint and alleged to have been adopted by the Board of Trustees of the town of Glenwood Springs on the 14th day of February, 1905, was ever recorded in any ordinance book, or book kept for the purpose of recording ordinances of the town of Glenwood Springs, nor was any such ordinance ever authenticated by the signature of the presiding officer of the Board of Trustees of said town, or by the Clerk of said Board. That no such ordinance as that alleged to have been adopted on February 14, 1905, was ever published in any newspaper published within the limits of the corporation of said town of Glenwood Springs, and defendant alleges that at the time of the alleged enactment and adoption of said ordinance, there was published in the town of Glenwood Springs a newspaper of general circulation in said town known as the Daily Avalanche; that said ordinance was not published in said paper nor in any other paper published in said town of Glenwood Springs, or in any paper having a general circulation therein.

12. Defendant denies that any franchise was granted, extended or renewed by the town of Glenwood Springs for a period of twenty years (20) from the first day of January, 1907, or for any other time, authorizing plaintiff or any predecessor of plaintiff
43 in interest, to construct and maintain or to maintain within the limits of the town of said Glenwood Springs, any system or plant for the purpose of supplying said town and the inhabitants thereof with electric light and power or to erect, maintain or operate within said town any poles or wires for said purposes.

13. Defendant admits that the charter of The Glenwood Light & Water Company, of Colorado, expired by limitation on the 8th day of September, 1908, but as to whether or not the property and rights of said company, were by the trustees of said Company, conveyed or transferred to plaintiff as alleged in Par. 8 of plaintiff's bill of complaint, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief. Defendant therefore denies the same and as to whether plaintiff since the 1st of November, 1909, or at any time, has been and is now in possession, enjoyment and ownership of the premises, property and rights of said, the Glenwood Light & Water Company of Colorado, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief and therefore denies the same.

14. Defendant admits that on the 18th day of October A. D. 1908,

the town of Glenwood Springs, by its Board of Trustees
44 enacted an ordinance, repealing, revoking, cancelling, rescinding and setting aside the alleged ordinance set forth in Par. 6 of plaintiff's bill of complaint and alleged to have been adopted February 14, 1905 and that said repealing ordinance is as set forth in Par. 9 of plaintiff's bill of complaint.

15. Defendant admits that plaintiff has for a long while and still continues to carry on business in the town of Glenwood Springs and to supply some of the inhabitants of said town with electric current for light and power purposes and that plaintiff did supply the town with electric current for lighting purposes until, by contract with this defendant, such electric current for lighting purposes was supplied to said town by defendant and defendant admits that plaintiff still continues to maintain its poles and wires in the streets and alleys of the town of Glenwood Springs, but denies that plaintiff has any right or franchise for maintaining its poles and wires in such streets and alleys.

16. Defendant admits that on the 17th day of February A. D. 1909, defendant was incorporated under the laws of the State of Colorado and admits that it afterwards petitioned the Board of Trustees of the town of Glenwood Springs, asking for a franchise and admits and alleges that an ordinance was enacted by
45 said Board of Trustees and was approved and adopted by a vote of the tax paying electors of said town at an election held in said town on the 4th day of April, 1911 and that said ordinance is as set forth in Par. 12, of plaintiff's bill of complaint, and defendant alleges that by said ordinance it was authorized to erect and maintain, operate and own, within said town of Glenwood Springs, an electric plant for the purpose of supplying the town of Glenwood Springs and the inhabitants thereof with light and power.

17. Defendant admits that on, to-wit, the 22nd day of September, A. D. 1911, a contract or agreement was entered into, by and between the town of Glenwood Springs and this defendant, whereby this defendant agreed to supply electrical lighting for the streets and alleys and other public places within said town for the term of ten (10) years and that said contract is as set forth in Par. 13 of plaintiff's bill of complaint.

18. Defendant admits that under said contract it began on or about the 1st of October 1912, to furnish said town with electric current for the purpose of lighting the town of said Glenwood Springs, and some of the inhabitants thereof, and ever since said time, has continued and still continues to furnish said electric current to said town and to its inhabitants.

19. Defendant admits that the poles and wires belonging
46 to the electric and power system, now claimed by plaintiff, were principally erected in the alleys of the town of Glenwood Springs and admits that they were erected in accordance with the terms of the franchise granted for the erection of such poles and wires to J. H. Devereux, David R. C. Brown and other associates.

20. Defendant admits that in the construction of its electric light-

ing and power system, some of its poles were erected and wires were strung thereon in the alleys of the town of Glenwood Springs and it admits that some of said poles were erected and wires strung thereon in the same alleys as the poles and wires, claimed by defendant, were erected and strung and defendant admits that some of said poles are erected and the wires strung on the same side of the alleys that the poles, claimed by defendant, occupy. But, defendant denies that its poles were so erected or its wires were so strung with any purpose or intention of interfering with or harassing plaintiff and defendant denies that any of its poles are so erected or that any of its wires are so strung in such method as is improper or dangerous, or in such manner as to interfere, in any way, with the operation of the plant claimed and operated by plaintiff. Defendant admits that some of its poles are erected on the same street as are the poles claimed and operated by plaintiff, and on the same
47 side of the street, but defendant denies that they are erected in such manner as to, in any way, interfere with or damage plaintiff's plant or the working or operations thereof, and defendant alleges that all its poles were erected and its wires strung in accordance with the instructions and under the direction of the City Council of the City of Glenwood Springs and at and during the time that said poles of defendant were being erected and its wires were being strung, that the manner and method of the erection and stringing thereof were well known to plaintiff and to its agents, managers and directors and that neither plaintiff nor any of its said agents, officiers or directors, made any objection to the manner of the erection of said poles or the stringing of said wires, during the erection and stringing thereof, nor at any time prior to the commencement of this action.

21. Defendant denies that any of its poles are so erected or that any of its wires are so strung, as to make the maintenance and operation by plaintiff, of its system, difficult or dangerous to the property of the plaintiff or to any of its customers or employees. Denies that the maintenance and operation of defendant's wires increase the possibility or probability of damage by fire to the property of the plaintiff, or to any of its customers, and
48 denies that said maintenance and operation, creates or maintains any danger, hazard or menace to the safety or lives of any of the customers of plaintiff or to any of its linemen or other employees. Denies that its wires are strung and maintained in such manner as to require of plaintiff the exercise of any unusual or extraordinary precautions or occasion to plaintiff any loss of time or additional expense, or so as to cause any injurious delays, hindrances or obstructions to the plaintiff in the maintenance of its wires and system, or so as to interfere in any way with plaintiff's service to its customers.

22. Defendant denies that the value of the electric light and power plant claimed and operated by plaintiff, is One Hundred and Fifty Thousand Dollars ($150,000.00), and alleges that the value of said plant is not to exceed Twenty-Five Thousand Dollars ($25,000.00) and defendant denies that the damage, caused by defendant to

plaintiff, or to its business or property or to its right to maintain its poles and wires without interference or injury in the alleys and streets of the Town of Glenwood Springs, where the poles and wires of defendant have been constructed is in excess of the sum of Three Thousand Dollars ($3,000.00)—or in any sum whatsoever and defendant alleges that the cost of removal of all the poles and wires of defendant, claimed by plaintiff, to be in dangerous or objectionable proximity to plaintiff's poles and wires, would not ex-
49 ceed the sum of Five Hundred Dollars ($500.00).

Wherefore, having answered all the matters and things contained in plaintiff's bill of complaint or all thereof that defendant is advised is material to be answered, defendant prays to be dismissed hence with its costs *on* this behalf incurred.

JOHN T. BARNETT,
Solicitors for Defendant.

(Endorsed:) No. 6022. In the District Court of the United States. The Glenwood Light & Water Company, a corporation, Plaintiff, vs. The Mutual Light, Heat & Power Company, a corporation, Defendant. Answer. Filed Jan. 31, 1913. Charles W. Bishop, Clerk. John T. Barnett, Attorney for Defendant.

Fifty-fifth Day, May Term, Wednesday, August 20th, A. D. 1913.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the twenty-second day of July, A. D. 1913.

In Chancery.

6022.

THE GLENWOOD LIGHT AND WATER COMPANY
vs.
THE MUTUAL LIGHT AND POWER COMPANY.

Bill for Injunction and for Other Relief.

This cause comes on to be further heard on final hearing, George L. Nye, Esquire, appearing as solicitor for the plaintiff and John A. Gordon, Esquire, appearing as solicitor for the defendant.
50 And the court having heard the testimony produced herein and the arguments of counsel, finds that it hath not jurisdiction of the amount in controversy in this cause.

Wherefore, it is ordered, adjudged and decreed by the court that the bill of complaint herein be, and the same is hereby, dismissed out of this court.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States.

THE GLENWOOD LIGHT AND WATER COMPANY, Complainant,
vs.
THE MUTUAL LIGHT, HEAT AND POWER COMPANY, Defendant.

Certificate of Jurisdictional Question.

I, Robert E. Lewis, Judge of the District Court of the United States within and for the District of Colorado, and holding the District Court of the United States within and for said district, do hereby certify that the above entitled cause did, on the 20th day of August, A. D. 1913, come on for final hearing before the court; and the question of jurisdiction having been raised by defendant, the court heard the arguments of counsel, and held, that the jurisdictional amount was fixed by the cost to the defendant of re-
51 moving its poles and wires in the streets and alleys where they conflicted or interfered with the poles and wires of complainant, and the replacement or reconstruction of said poles and wires in such position as to avoid conflict and interference; and testimony having been presented by the complainant for the purpose of determining whether such cost to the defendant would exceed the sum of Three Thousand Dollars exclusive of interest and costs, and the court having determined that under the evidence such cost would not exceed said amount, and the complainant conceding that under the evidence such cost would not exceed such amount, dismissed the bill for want of jurisdiction, although the complainant contended and still contends that such method was not the proper method of determining the jurisdictional amount, but that the amount in controversy necessary to give the court jurisdiction of this cause was (1), the value of the property of the complainant, or (2), the amount of damage caused to the complainant and its business and property, and to its right to maintain its poles and wires without interference or injury, or (3), the value of the poles and wires of defendant in the streets and alleys where they conflicted with and caused damage to the poles and wires of complainant.

And I do further certify that the order of dismissal herein made was based solely on the ground that the amount in controversy
52 was not sufficient to give a Federal Court jurisdiction.

This certificate is made conformably to the Act of Congress of March 3, 1891, Chapter 517, and is given at the same term of court at which said hearing was held and said order of dismissal entered.

Dated at Denver, Colorado, this 3rd day of November, A. D. 1913.

ROBT. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

(Endorsed:) 6022. U. S. District Court District of Colorado. The Glenwood Light and Water Company vs. The Mutual Light, Heat and Power Company. Certificate of Judge under act of Congress. Filed Nov. 3, 1913. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States.

THE GLENWOOD LIGHT AND WATER COMPANY, Complainant,
vs.
THE MUTUAL LIGHT, HEAT AND POWER COMPANY, Defendant.

Statement of Testimony.

53 The only testimony was that of W. L. Reynolds, a witness called on behalf of the complainant, whose testimony was as to the cost to the defendant of removing its poles and wires where they conflicted with those of the complainant and their replacement or reconstruction in such position as to avoid conflict and interference, and his testimony showed that such cost would not amount to the sum of Three Thousand Dollars ($3000.00).

W. H. BRYANT,
GEORGE L. NYE,
WM. P. MALBURN,
Solicitors for Complainant.

Nov. 25, 1913. Approved. Lewis Judge. Lodged in Clerk's office November 14th, 1913.

(Endorsed:) No. 6022. In the United States District Court of the District of Colorado. The Glenwood Light and Water Company, Complainant, versus The Mutual Light, Heat and Power Company, Defendant. Plaintiff's narrative statement of testimony. Filed Nov. 25, 1913. Charles W. Bishop, Clerk. Thomas, Bryant, Nye & Malburn, Attorneys for Complainant. 621-629 Ernest and Cranmer Bldg., Denver, Colo.

54 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States.

THE GLENWOOD LIGHT AND WATER COMPANY, Complainant,
vs.
THE MUTUAL LIGHT, HEAT AND POWER COMPANY, Defendant.

Assignment of Errors.

Comes now the complainant above named, by its solicitors, and says, that in the record and proceedings herein there is manifest error, to its great prejudice, in the following particulars, to-wit:

1st. The Court erred in dismissing the said cause.

2nd. The Court erred in deciding that the District Court of the United States for the District of Colorado was without jurisdiction to entertain and determine the controversy presented in this cause.

3rd. The Court erred in deciding that this cause did not really and substantially involve a dispute or controversy properly within the jurisdiction of this court.

4th. The Court erred in deciding that the amount in controversy, exclusive of interest and costs, was less than the sum of Three Thousand Dollars ($3000.00).

5th. The Court erred in holding that the proper method of determining the amount of the controversy for the purpose of deciding whether the court had jurisdiction was not (1) the value of
55 the property of the complainant, nor (2) the amount of damage caused to the complainant and its business and property, and to its right to maintain its poles and wires without interference or injury, nor (3) the value of the poles and wires of defendants in the streets and alleys where they conflicted with and caused damage to the poles and wires of complainant, but in holding that the jurisdictional amount is fixed by the cost and expense to the defendant of removing the poles and wires which conflict and interfere with those of complainant.

6th. The Court erred in determining that this cause was not within the jurisdiction of the District Court of the United States for the District of Colorado.

Wherefore, the complainant prays that the said order and decree of dismissal may be reversed.

CHARLES S. THOMAS,
W. H. BRYANT,
GEORGE L. NYE,
WM. P. MALBURN,
Solicitors for Complainant.

(Endorsed:) No. 6022. In the United States District Court of the District of Colorado. The Glenwood Light and Water Company, Complainant, versus The Mutual Light, Heat and Power Company, Defendant. Assignment of Errors. Filed Nov. 3, 1913. Charles W. Bishop Clerk. Thomas, Bryant, Nye & Malburn, Attorneys for Complainant. 621-629 Ernest and Cranmer Bldg., Denver, Colo.

56 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States.

THE GLENWOOD LIGHT AND WATER COMPANY, Complainant,
vs.
THE MUTUAL LIGHT, HEAT AND POWER COMPANY, Defendant.

Petition for Appeal.

The above-named complainant conceiving itself aggrieved by the order and decree of dismissal made and entered on the 20th day of August, A. D. 1913, in the above entitled cause, does hereby appeal from the said order and decree to the Supreme Court of the United States solely on the question of jurisdiction of the District Court, for the reasons specified in the assignment of errors heretofore filed herein and presented herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 18th day of October, A. D. 1913.

CHARLES S. THOMAS.
W. H. BRYANT.
57 GEORGE L. NYE.
WM. P. MALBURN.

The foregoing claim of appeal is allowed.
Dated this 18th day of October, A. D. 1913.

ROBT. E. LEWIS,
Judge of the District Court of the United States within and for the District of Colorado.

(Endorsed:) No. 6022. In the United States District Court of the District of Colorado. The Glenwood Light and Water Company, Complainant versus The Mutual Light, Heat and Power Company, Defendant. Petition for Appeal. Filed Nov. 3, 1913. Charles W. Bishop, Clerk. Thomas, Bryant, Nye & Malburn, Attorneys for Complainant. 621-629 Ernest and Cranmer Bldg., Denver, Colo.

Ninetieth Day, May Term, Monday, November 3rd, A. D. 1913.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the twenty-second day of July, A. D. 1913.

In Chancery.

6022.

THE GLENWOOD LIGHT AND WATER COMPANY
vs.
THE MUTUAL LIGHT, HEAT AND POWER COMPANY.

Bill for Injunction and for Other Relief.

This cause comes on now to be heard, William P. Malburn, Esquire, appearing as solicitor for the plaintiff, And there-
58. upon, the plaintiff prays an appeal to the Supreme Court of the United States from the decree heretofore, and on, to-wit, the twentieth day of August, A. D. 1913, entered herein, which is hereby allowed to it, but upon the condition nevertheless that it give bond on such appeal in the sum of five hundred dollars ($500.00).

Bond on Appeal.

THE UNITED STATES OF AMERICA,
District of Colorado:

Know all men by these presents, That we, The Glenwood Light and Water Company, C. C. Parks and H. G. Overbeck are held and firmly bound unto The Mutual Light, Heat and Power Company in the full and just sum of Five Hundred Dollars to be paid to the said The Mutual Light, Heat and Power Company heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 6 day of November in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at the May term, A. D. 1913, of the circuit court of the United States for the district of Colorado, sitting at Denver, in a suit pending in said court between The Glenwood Light and Water Company Complainant, and The Mutual Light, Heat and Power Company Respondent judgment was rendered against
59 the said The Glenwood Light and Water Company and the said The Glenwood Light and Water Company having prayed and been allowed an appeal to the United States Supreme Court to reverse the judgment in the aforesaid suit; and a citation directed to the said The Mutual Light, Heat and Power Company citing and admonishing it to be and appear, in the United States Supreme Court at the city of Washington, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said The Glenwood Light and Water Company shall prosecute said appeal to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

[Corporate Seal Glenwood Light & Water Co.]

GLENWOOD LIGHT & WATER COMPANY, [SEAL.]
By C. C. PARKS, *President.* [SEAL.]
C. C. PARKS. [SEAL.]
H. G. OVERBECK. [SEAL.]

Nov. 12, 1913.

Approved,

ROB'T E. LEWIS, *Judge.*

(Endorsed:) No. 6022. United States District Court District of Colorado. The Glenwood Light and Water Company vs. The Mutual Light, Heat and Power Company. Bond on Appeal $500.00. Filed Nov. 12, 1913. Charles W. Bishop, Clerk. Bryant, Nye & Malburn, Attorney- for Appellant.

60 Friday, November 28th, A. D. 1913.

At Chambers; before the Honorable Robert E. Lewis, District Judge, the following proceeding was had:

6022.

In Chancery.

THE GLENWOOD LIGHT AND WATER COMPANY
vs.
THE MUTUAL LIGHT, HEAT AND POWER COMPANY.

Bill for Injunction and for Other Relief.

This cause comes on now to be heard. And thereupon, on consideration thereof, and upon just cause shown therefor,

It is ordered by the court that the return day of the citation on appeal to the Supreme Court of the United States in this cause be, and the same is hereby enlarged and extended for thirty (30) days from this day.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States.

THE GLENWOOD LIGHT AND WATER COMPANY, Complainant,
vs.
THE MUTUAL LIGHT, HEAT AND POWER COMPANY, Defendant.

Præcipe for Record.

The Clerk will please make copies, in the above-entitled cause, for appeal to the Supreme Court of,

61 1. The Bill,
2. Answer,
3. Decree,
4. Certificate of Jurisdictional Question,
5. Assignment of Errors,
6. Prayer for Appeal,
7. Bond,
8. Citation, and
9. Statement of Testimony.

W. H. BRYANT,
GEORGE L. NYE,
WM. P. MALBURN,
Solicitors for Complainant.

Received a copy of the above præcipe at Denver, Colorado, this 14 day of November, 1913.

JOHN A. GORDON,
Solicitors for Defendant.

(Endorsed:) No. 6022. In the United States District Court of the District of Colorado. The Glenwood Light and Water Company, Complainant, versus The Mutual Light, Heat and Power Company, Defendant. Præcipe for Record. Filed Nov. 14, 1913. Charles W. Bishop, Clerk. Thomas, Bryant, Nye & Malburn, Attorneys for Complainant, 621-629 Ernest and Cranmer Bldg., Denver, Colo.

62 *Citation on Appeal.—U. S. Circuit Court of Appeals.*

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Supreme Court.

The United States of America to The Mutual Light, Heat, and Power Company, Greeting:

You are hereby cited and admonished to be and appear in The United States Supreme Court, at the City of Washington, thirty

days from and after the day this citation bears date, pursuant to an appeal allowed by The District Court of the United States for the District of Colorado, sitting at Denver, wherein The Glenwood Light and Water Company is appellant and you are appellee to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Robert E. Lewis, Judge of the district court of the United States for the district of Colorado, at Denver, in said district, this 3d day of November A. D. 1913.

ROBT. E. LEWIS, *Judge.*

Proof of Service.

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

On this — day of ——, A. D. 191–, personally appeared —— —— before me, the subscriber, clerk of the circuit court of the United States, for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

Subscribed and sworn to before me this — day of ——, A. D. 191–.

—— ——, *Clerk.*
—— ——, *Deputy Clerk.*

Service of the within citation is hereby accepted for and on behalf of The Mutual Life Heat and Power Company and personal service waived.

JOHN A. GORDON,
Solicitor for Appellee.

[Endorsed:] No. 6022. United States Supreme Court. Eighth Circuit. The Glenwood Light and Water Company vs. The Mutual Light, Heat & Power Company. Citation. Filed Nov. 12, 1913. Charles W. Bishop, Clerk.

63 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to sixty-one (61), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings, and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe, heretofore filed or entered of record in said court and in a certain cause lately in said court pending, wherein The Glenwood Light and Water Company is plaintiff and The Mutual Light, Heat and Power Company is defendant, as fully and completely as the same still remain on file and of record in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this eighth day of December, A. D. 1913.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Endorsed on cover: File No. 23,972. Colorado D. C. U. S. Term No. 315. The Glenwood Light and Water Company, appellant, vs. The Mutual Light, Heat and Power Company. Filed December 18th, 1913. File No. 23,972.

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In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. 315.

THE GLENWOOD LIGHT AND WATER COMPANY,
APPELLANT,

VS.

THE MUTUAL LIGHT, HEAT AND POWER COMPANY,
APPELLEE.

On Appeal from the District Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT ON BEHALF OF APPELLANT.

STATEMENT.

This is an appeal from a judgment of the United States District Court for the District of Colorado dismissing appellant's bill on the ground that the Court did not have jurisdiction of the amount in controversy in this cause.

There is but one question involved in this cause, upon this appeal, and that is whether the record discloses that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, within the meaning of the Judicial Code, Sec. 24, par. First.

ALLEGATIONS OF THE BILL.

On the 15th day of November, A. D. 1912, the appellant, The Glenwood Light and Water Company, a Nevada corporation, filed its bill in equity against The Mutual Light, Heat and Power Company, a Colorado corporation, in the District Court of the United States for the District of Colorado, praying injunctive relief.

The bill alleges the incorporation of the appellant company and the incorporation of the appellee company; that the appellant company is a citizen of the State of Nevada; that the appellee company is a citizen of the State of Colorado; that the controversy is wholly between a citizen of the State of Nevada and a citizen of the State of Colorado, and "that the amount in controversy herein exceeds the sum of three thousand dollars ($3,000.00), exclusive of interest and costs." (Transcript of Record, pages 1-2.)

It is alleged in the bill that the complainant is the owner, by assignment to it, of a franchise granted by the town of Glenwood Springs, Colorado, and subsequently renewed, to erect and maintain an electric power plant within the corporate limits of said town for the purpose of supplying said town and the inhabitants thereof with electric light and power; that the complainant and its assignors did construct an electric light and power system pursuant to, in accordance with and for the purposes mentioned in said franchise, and did erect poles and wires for the purpose of conveying electricity for light and power purposes, in the alleys of said town of Glenwood Springs in the manner provided for in said franchise, and that complainant has at all times continued to carry on its business and has supplied electric current for light and

power purposes to the town of Glenwood Springs, and that it still continues to maintain its poles and wires in the streets and alleys of said town. (Transcript of Record, pages 2-8.)

It is averred in the bill that in April, 1911, said town of Glenwood Springs attempted to grant to the defendant, The Mutual Light, Heat and Power Company, the right to erect a plant in said town and to construct a system for the purpose of furnishing the town and inhabitants thereof with electric current for light and power purposes; that said company commenced the construction of a plant and commenced furnishing light to the town of Glenwood Springs on or about October 1, 1912, since which date its wires have been used for carrying electric current for the purpose of furnishing light to said town and to some of the inhabitants thereof. (Transcript of Record, pages 8-16.)

The bill then avers:

XV.

"That the poles belonging to the system of your orator and used for the purpose of carrying the wires through which runs the electric current used for furnishing light and power to the town of Glenwood Springs and the inhaibtants thereof within the limits of the town of Glenwood Springs, were erected, so far as practicable, in the alleys of said town, as was provided in the original ordinance granted to J. H. Devereux, David R. C. Brown and their associates, the franchise contained in said ordinance being afterwards assigned by the grantees to The Glenwood Light and Power Company, and by it to your orator, as is hereinbefore recited, and that the wires of your orator are

strung on said poles and connected with the premises of its customers in accordance with the terms of its franchise and the rules and regulations of the town of Glenwood Springs.

XVI.

"And your orator, further complaining, alleges that defendant, notwithstanding that its franchise granted it the right to erect its poles and string its wires along all of the streets and alleys of said town and that the defendant has erected poles in the streets of said town which support the lamps used to light the streets under the aforesaid contract, and that the streets of said town are very wide and unoccupied by any other poles but the said poles of the defendant, yet it has erected its poles and strung its wires principally in the alleys of said town, and particularly in the alleys occupied by the poles and wires of your orator, and, with the exception of a few blocks in one alley, has erected its poles and strung its wires on the same side of the alleys as that used and occupied by the poles and wires of your orator, as your orator is informed and believes, maliciously and for the purpose and with the intent of interfering with and harassing your orator, notwithstanding the fact, well known to defendant and to electrical engineers and constructors, as well as to insurance men and to the public generally, that such method is improper and dangerous and that it would interfere with the operation of the plant of your orator and would injure its property; that approximately one hundred and fifty (150) poles have been erected by defendant, of which not less than one hundred (100) are erected on the

same side of the alleys on which are erected the poles and wires of your orator, and in addition thereto the said defendant has erected its poles and strung its wires on one of the streets of said town on which your orator has erected its poles and strung its wires, and on the same side of the street, there being eighteen (18) of defendant's poles with wires of said defendant on the same side of the street as the poles and wires of your orator.

XVII.

"That the poles erected and used by your orator are of good material and the size usually employed for the same purpose in towns and cities approximating the size of the town of Glenwood Springs, but that the poles erected and used by defendant are much smaller in circumference and about six feet shorter than the poles of your orator. That on account of the narrowness of the alleys the poles of defendant have been set by it necessarily on practically the same line as the poles of your orator; that defendant uses in stringing its wires a system of cross-arms attached to its said poles. That by reason of its shorter poles and its system of cross-arms the wires of defendant are brought immediately below and in such close proximity to the wires of your orator, and close to and on either side of the poles of your orator, in such manner as to make the maintenance and operation by your orator thereof extremely difficult as well as dangerous to the property of your orator and its customers and employees. That the mantenance and operation of defendant's wires as aforesaid increases the possibility and probability of damage by fire caused by short circuits to the property of your orator and its customers, and

creates and maintains a danger, hazard and constant menace to the safety and lives of the customers of your orator and of its linemen and other employees, who in the discharge of their duties are frequently required to climb its poles, thus being required, so long as defendant continues to maintain its wires as aforesaid, to pass through and between its wires carrying a high voltage of electrical current, sufficient to kill any person coming in contact therewith.

"Your orator further alleges that, as the wires of defendant are now strung and maintained by it, it is practically impossible for a lineman or other person to climb the poles belonging to your orator for the purpose of making repairs thereto or connections therewith without coming in contact with the high tension wires of defendant, thus producing a constant menace to the safety and lives of such employees of your orator, and requiring the exercise of unusual and extraordinary precautions, and the loss of time and consequent additional expense, which, without such maintenance of said wires by defendant, would be unnecessary, and which unusual and extraordianry precautions cause great and injurious delays, hindrances and obstructions to your orator in the maintenance of its wires and system and in its service to its customers.

XVIII.

"Your orator, further complaining, says that so long as the poles and wires of defendant are permitted to remain where they are, in such close proximity to the poles and wires of your orator, your orator will be at a great and continuous additional expense in operating its system on account of the additional precau-

tions required to be taken to protect the safety and lives of its customers and of its linemen and other employees, its own plant and the property of its customers from the danger of fire through short-circuiting, caused by the wires of the said defendant coming in contact with those of your orator. Your orator further says that, in spite of any and all precautions possible to be taken by your orator to protect its customers and its linemen and other employees from danger, no absolute protection can be assured while defendant continues to maintain its poles and wires as aforesaid, and your orator is liable to be subjected to many suits on account of injuries to its employees and customers, and will be required to incur additional and large and unusual expense on account of physicians' and hospital services rendered to such of its employees as may become injured. And your orator further alleges that it is and constantly will continue to be threatened, so long as defendant so maintains its poles and wires as aforesaid, with liability in case of injuries, to persons and property caused by the maintenance by defendant of its wires and electric current in such close proximity to the wires and current of your orator as to make dangerous the operation thereof, and which liability, together with the other liability hereinbefore referred to, will continue so long as the poles and wires of defendant are permitted to remain as they now are.

XIX.

"And your orator further complaining, says that its business is increasing and more wires are being constantly required to supply the wants of its customers, and this will require in time the setting of cross-

bars on the poles, below the cross-bars now in use, whereby the wires belonging to your orator will be brought much closer to the wires belonging to defendant than they are at present and thereby greatly increasing the danger and expense and the probability of injuries to your orator and its employees and its customers as aforesaid.

XX.

"And your orator, further complaining, says that the value of its electric light and power plant is One Hundred and Fifty Thousand Dollars ($150,000.00), and that the damage caused to your orator and its business and property, and to its right to maintain its poles and wires without interference or injury in the alleys and streets of the Town of Glenwood Springs, where the poles and wires of defendant have been constructed in such close proximity to the poles and wires of your orator as aforesaid, is largely in excess of the sum of Three Thousand Dollars ($3,000.00), and that the value of the poles and wires of defendant in the said streets and alleys exceeds the sum of Three Thousand Dollars ($3,000.00).

XXI.

"Your orator, further complaining, alleges and says that by reason of the number of its customers whose premises are connected with the wires of its system, by reason of the number of different buildings with which your orator's electric light and power system is connected, by reason of the number of poles, belonging to your orator and the extent of its wires interfered with by the poles and wires of defendant, as hereinbefore alleged and set forth, and by reason of the number of employees of your orator whose

duties require them frequently to ascend the poles belonging to your orator, the instances in which your orator may be subjected to actions at law for damages for injuries to persons and to property are greatly increased in number and in magnitude, and your orator is now subjected to and will, so long as the conditions created by defendant and herein complained of are suffered to exist, continue to be subjected to numerous liabilities and actions at law for damages arising out of such conditions created by the acts of defendant as aforesaid, and that by reason thereof and because of the numerous liabilities and actions at law arising and to arise, threatened and to be threatened, as well as by reason of all matters and things hereinbefore alleged and set forth, your orator has no plain, speedy and adequate remedy at law in the premises." (Transcript of Record, pages 17-20.)

The prayer of the bill is that an injunction may be issued against the defendant, The Mutual Light, Heat and Power Company, enjoining it, its agents, servants, attorneys, employees, successors and assigns, perpetually, from maintaining its poles and wires on the same side of the alleys and streets in the town of Glenwood Springs as those occupied by the poles and wires of the complainant, The Glenwood Light and Water Company, and from maintaining its poles and wires in such proximity to the poles and wires of the complainant as to injure or endanger the property of the complainant and its customers and the safety and lives of the customers of the complainant and of its employees and to cause complainant great expense, annoyance and inconvenience in maintaining, operating and repairing its electric light system in the said town of Glenwood Springs; that the complainant may have such further and different relief in the premises

as the nature of the circumstances of the case may require. (Transcript of Record, pages 20-21.)

ALLEGATIONS OF THE ANSWER.

The answer of the defendant denies that the amount in controversy in the cause exceeds the sum of three thousand dollars, exclusive of interest and costs, and alleges that the value does not exceed the sum of five hundred dollars (Transcript of Record, page 22); admits that the complainant has for a long while carried on and still continues to carry on business in the town of Glenwood Springs and to supply the same and the inhabitants of said town with electric current for light and power purposes, and that the complainant continues to maintain its poles and wires in the streets and alleys of the town of Glenwood Springs (Transcript of Record, page 24); denies that the value of the electric light and power plant claimed and operated by the complainant is one hundred and fifty thousand dollars, as alleged by it, and alleges that the value of said plant is not to exceed twenty-five thousand dollars, and the defendant denies that the damage caused by the defendant to the complainant, or to its business or property or to its right to maintain its poles and wires without interference or injury in the alleys and streets of the town of Glenwood Springs where the poles and wires of the defendant have been constructed, is in excess of the sum of three thousand dollars, or in any sum whatsoever, and the defendant alleges that the cost of removal of all the poles and wires of the defendant, claimed by complainant, to be in dangerous or objectionable proximity to its poles and wires, would not exceed the sum of five hundred dollars. (Transcript of Record, pages 25-26.)

EVIDENCE.

The only testimony considered on the final hearing of the cause was as to the cost to the defendant of removing its poles and wires where they conflicted with those of the complainant, and their replacement or reconstruction in such position as to avoid conflict and interference, and this testimony showed that such cost would not amount to the sum of three thousand dollars. (Transcript of Record, page 28.)

At the conclusion of such testimony the District Court found it had not jurisdiction of the amount in controversy in this cause and ordered that the bill of complaint be dismissed. (Transcript of Record, page 26.)

The certificate of the Honorable Robert E. Lewis, Judge of the District Court of the United States for the District of Colorado, that the order of dismissal in the cause was based solely on the ground that the amount in controversy was not sufficient to give a federal court jurisdiction, was made conformably to the Act of Congress of March 3, 1891, Chapter 517. (Transcript of Record, page 27.)

ASSIGNMENT OF ERRORS.

The following errors were assigned by the complainant, The Glenwood Light and Water Company, to the decision of the District Court and are now hereby assigned:

1st. The Court erred in dismissing the said cause.

2nd. The Court erred in deciding that the District Court of the United States for the District of Colorado was without jurisdiction to entertain and determine the controversy presented in this cause.

3rd. The Court erred in deciding that this cause did not really and substantially involve a dispute or controversy properly within the jurisdiction of this court.

4th. The Court erred in deciding that the amount in controversy, exclusive of interest and costs, was less than the sum of three thousand dollars ($3,000.00.)

5th. The Court erred in holding that the proper method of determining the amount of the controversy for the purpose of deciding whether the court had jurisdiction was not (1) the value of the property of the complainant, nor (2) the amount of damage caused to the complainant and its business and property, and to its right to maintain its poles and wires without interference or injury, nor (3) the value of the poles and wires of defendants in the streets and alleys where they conflicted with and caused damage to the poles and wires of complainant, but in holding that the jurisdictional amount is fixed by the cost and expense to the defendant of removing the poles and wires which conflict and interfere with those of complainant.

6th. The Court erred in determining that this cause was not within the jurisdiction of the District Court of the United States for the District of Colorado.

ARGUMENT.

The assignments of error all relate to the same proposition—whether the matter in controversy, exclusive of interest and costs, exceeds the sum or value of three thousand dollars, and they may be discussed together.

That the Court erred in holding that the proper method of determining the amount of the controversy for the purpose of deciding whether the Court had jurisdiction was the cost and expense to the defendant of removing the poles which conflict and interfere with those of complainant, which cost and expense was testified to be less than three thousand dollars, is clear to us from a consideration of the cases wherein perpetual injunctive relief is sought for the purposes for which it is sought in this cause.

The injunctive relief prayed is sweeping and, if granted, will prevent the defendant, its successors and assigns, from maintaining not alone the existing poles and wires which constitute a menace and danger to persons and property, and a trespass upon the rights of complainant, but also any such poles and wires that may be erected and strung in the future, which from the character or manner of erection or stringing, will amount to a violation by defendant of the terms of such injunctive relief.

The Court can undoubtedly order the defendant to remove its existing poles and wires, but we submit that such relief is but incidental to the full protection to its rights and property sought by complainant herein.

Complainant's bill, quoted hereinbefore (Transcript of Record, pages 17-20), alleges with great

detail the difficulty and danger to persons and property incident to the maintenance of complainant's poles and wires by reason of the unnecessary proximity to them of the defendant's poles and wires and the great, continuous additional expense to complainant in operating its system, and the liability of the complainant to suits for damages for injuries to persons and property occasioned by such proximity. The value of complainant's electric light and power plant is alleged to be one hundred fifty thousand dollars, and it is admitted to be twenty-five thousand dollars, the damage caused complainant and its property and its right to maintain its poles and wires without interference or injury on the part of the defendant is alleged to be in excess of three thousand dollars, and the value of the poles and wires of the defendant complained of is alleged to be in excess of the jurisdictional amount, and it is our contention on behalf of the appellant that, in view of these allegations, the District Court should not have dismissed the bill.

This contention we believe is fully supported by the cases decided by this Court, the earliest, perhaps, being The Mississippi and Missouri Railroad Company vs. Ward, 2 Black 485, decided in 1862.

In the case of Scott vs. Donald, 165 U. S. 107, a bill for an injunction was filed by Donald against Scott and others, constables of the State of South Carolina.

The bill alleged that the complainant had imported, and intended to import into South Carolina for his own use, from time to time, ales, wines and liquors from other states of a value exceeding two thousand dollars; that of those so imported some had been seized and carried away by the defendants, claiming to act as constables under a law of the State of South

Carolina, and that defendants had threatened to continue to seize and carry away the ales, wines and liquors which the complainant intended to so import; that complainant's right to import liquor for his own use is of the money value of upwards of two thousand dollars.

In answer to the suggestion that jurisdiction did not exist in the Circuit Court because the value in controversy did not exceed the sum of two thousand dollars, Mr. Justice Shiras, who delivered the opinion of this Court, after stating the facts, the substance of which are given above, said on page 115:

> "Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of two thousand dollars. Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail."

In McNeill vs. Southern Railway Company, 202 U. S. 543, it appears from the statement of facts in this case that The Greensboro Ice and Coal Company had a private spur track leading from the main line of the Southern Railway Company to its establishment, and that the railway company had at one time delivered cars consigned to the ice and coal company from its main track to such spur track.

A dispute, the origin of the controversy, arose

between the railway company and the ice and coal company concerning demurrage on thirteen cars containing coal and wood consigned to the latter company. In consequence of a refusal to pay these charges the railway company notified the ice and coal company that after a certain date it would only deliver cars consigned to the ice and coal company on the public tracks of the railway company. After being so notified the ice and coal company ordered four cars of coal from Pennsylvania and other states, and upon reaching Greensboro these cars were placed upon one of the public tracks of the railway company and delivery tendered to the ice and coal company. That company declined to receive or unload the cars elsewhere than on its private siding.

Subsequently, upon complaint being filed, the North Carolina Corporation Commission, created and acting under the statutes of North Carolina, which provided for the recovery of penalties for the violation of the orders of the commission, made an order requiring the railway company to make delivery upon the siding or spur track referred to, and an appeal was taken from such order to a state Court. Later a bill, alleging many grounds for relief, was filed by the railway company in the Circuit Court for the Eastern District of North Carolina, seeking to perpetually enjoin the bringing of actions against it by The Greensboro Ice and Coal Company and the corporation commission to recover penalties or damages under the authority of said statute, because of the non-compliance of the railway company with the order of the commission.

We quote from the opinion delivered by Mr. Justice White, on page 558:

* * * "But three questions are essential to be passed upon. They are, First, whether the record discloses that the matter in dispute exceeds, exclusive of interest and costs, the sum of value of two thousand dollars." * * *

"It was urged in argument on behalf of the commission and the ice and coal company that the extra cost of expense, if any, of placing the four cars of coal on the siding was the matter in controversy. In the court below it would seem to have been claimed that the one hundred and forty-six dollars demurrage was the question at issue. However this may be, as said by the trial court, although the demurrage dispute may have been the origin of the litigation, there is involved in the controversy presented by the bill not only the right to enforce against the railway company the payment of statutory penalties much in excess of two thousand dollars, but also the right of that company to carry on interstate commerce in North Carolina without becoming subject to such orders and directions of the corporation commission which so directly burdened such commerce as to amount to a regulation thereof. This latter right is alleged in the bill to be of the necessary jurisdictional value, the averment was supported by testimony, and the master and the court below have found such to be the fact. There is no merit in the contention that there is a want of jurisdiction to entertain the writ of error."

The case of Hunt vs. New York Cotton Exchange, 205 U. S. 322, was instituted by the filing of a bill in equity by the New York Cotton Exchange, a New York corporation, against Hunt, a citizen of Tennessee. The complainant sought to enjoin Hunt from receiving from a telegraph company and using the quotations of sales made upon the exchange, which quotations were alleged and held by this Court to be the property of the exchange, and were being used by appellant without his subjecting himself to the conditions and restrictions imposed by the exchange upon the use thereof.

The complainant alleged that the receipt and use of the quotations by the defendant was calculated to and in time would, if not entirely stopped, seriously impair the value to the complainant of its quotations, and that if even one person was allowed to secure such quotations without the restrictions as to the use thereof imposed by the complainant, such person could furnish them to all the bucket shops and other persons within the United States desiring them, and thus entirely defeat the efforts of the complainant to prevent their use in bucket shops as a basis of illegal bets, and materially impair the right of the complainant to derive a revenue from the distribution of such quotations. It was also alleged in the bill that "the amount involved and matters in dispute, exclusive of interest and costs, is much more than the sum of $2,000."

Appellant filed a plea to the jurisdiction, traversing the allegations of the bill which averred the jurisdictional amount.

In the opinion of this Court Mr. Justice McKenna said, at page 336:

"It is manifest that the injury to the exchange is not the rate paid by the appellant to the telegraph company. The purpose of the suit is to enjoin the appellant from receiving, using or selling, directly or indirectly, the exchange's quotations or permitting or maintaining any wire to his office over which the quotations are passing, or distributing the quotations, until he shall have acquired the right to receive them either by contract or purchase from the exchange, or with its consent and approval, from one of the telegraph companies authorized to distribute them. In other words, the object of the suit is to keep the control of the quotations by the exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops. And the right to the quotations was declared, as we said in *Board of Trade vs. Christie Grain & Stock Company,* to be property, and the exchange may keep them to itself or communicate them to others. The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the exchange determines the jurisdiction, not the rate paid by appellant to the telegraph company. The value of the right was testified to be much greater than $2,000. In *Mississippi & Missouri Railroad Company vs. Ward,* 2 Black 485, it was decided that jurisdiction is tested by the value of the object to be gained by the bill. To the same effect is *Board of Trade vs. Cella Commission Company,* 145 Fed. Rep. 28.

> In the latter suit the Chicago Board of Trade obtained a decree restraining the use of its continuous quotations by the Cella Commission Company. It was said that the amount or value of such right is not the sum a complainant might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. The latter declaration is supported by *Scott vs. Donnell*, 165 U. S. 107."

From the case of Bitterman vs. Louisville and Nashville Railroad Co., 207 U. S. 205, it appears that the Louisville and Nashville Railroad Company sought an injunction in the Circuit Court of the United States for the Eastern District of Louisiana, perpetually enjoining Bitterman and others, ticket brokers in the city of New Orleans, from buying, selling or dealing in non-transferrable round trip tickets issued at reduced rates for passage over the lines of the railway of the complainant.

The bill averred the wrong complained of, the practice of each defendant of buying and selling the return coupons of non-transferable tickets issued by the railroad company, for the purpose of putting them in the hands of purchasers to be fraudulently used for passage on the trains of complainant, and averred that the defendants intended to continue such practice to the irreparable damage of the complainant. Averments were also made as to the additional burden which would be cast upon complainant's conductors and train collectors by reason of the practice complained of, the danger which would arise of a multiplicity of suits for damages by reason of errors of

such employes in endeavoring to prevent the fraudulent use of such tickets, and finally it was alleged that the amount involved in controversy, exclusive of interest and costs, exceeded the sum of five thousand dollars, and that the value of the business, which was sought to be protected, and the rights which the complainant sought to have recognized and enforced, exceeded, in the case of each defendant, the sum of five thousand dollars, exclusive of interest and costs.

The proposition that the Court had no jurisdiction to entertain the bill and the contention that a consideration of the whole bill established that the jurisdictional amount alleged was merely colorable and fictitious, were held to be without merit, and so, because the averments of the bill as to the number of tickets issued, the magnitude of the wrongful dealings in nontransferable tickets by the defendants, the cost and the risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complainant, the operation of the illegal dealing in such tickets upon the right of the complainant to issue them in the future, coupled with the admissions of the answer, sustained the express averment as to the requisite jurisdictional amount, and the following language is used by Mr. Justice White, on page 225, in the opinion of the Court:

> "Besides the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and

enforced. *Hunt vs. N. Y. Cotton Exchange,* 205 U. S. 322, 336."

The most recent expression of this Court on the subject under consideration, which has been brought to our attention, is the case of Berryman vs. Board of Trustees of Whitman College, 222 U. S. 334. The opinion in this case was written by Mr. Chief Justice White, and, as in the cases hereinbefore cited, there was no dissenting opinion.

In 1905 the assessing officers of Walla Walla County, State of Washington, assessed under a state law, the real property of Whitman College not actually and physically used for the purpose of the institution, and taxes were levied on such assessment amounting to $946.32.

The college filed its bill in the United States Circuit Court, averring that it enjoyed a contract right of exemption from taxation, the acquisition by it of large amounts of property, the detriment and loss which would be occasioned as the result of levying taxes upon the property of the corporation, the destruction of the right of perpetual exemption, not only as to the present but as to all future acquired property of the corporation and consequent loss and damage vastly in excess of two thousand dollars, and in substance the prayer was for a decree recognizing and enforcing the contract of perpetual exemption from taxation as to all the property of the corporation, present or prospective, and for an injunction adequate to secure these results.

The defendant challenged the jurisdiction of the court and the equity of the bill, but the Circuit Court held that it had jurisdiction.

The appellants contended in the Supreme Court

that the Circuit Court had no jurisdiction, and the theory was advanced that as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. This theory was rejected by this Court because it misconceived the relief prayed for, which was the enforcement of the contract exemption during the perpetual life of the corporation and as broad as its power to acquire and hold property. The Chief Justice said, on page 345:

> "Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case where the issue presented is not only the right to collect, but also to levy all future taxes. The admission that the right to tax may be abridged by contract and that such contract may not be impaired without violating the Constitution, carries with it of necessity the power and the duty to protect the contract right and in the nature of things causes jurisdiction for such purpose to be measured by the value of the right to be protected, and not by the value of some mere isolated element of that right."

There are numerous decisions of the various United States Circuit, District and Circuit Courts of Appeals in harmony with our views in this case and announcing the same principles as are laid down in the foregoing cases.

Particularly analogous to the case at bar as to facts is the case of Amelia Milling Co. vs. Tennessee Coal, Iron & R. Co., decided by a Georgia Circuit Court and reported in 123 Fed. 811. In that case the Court held that the amount involved for jurisdictional purposes in a suit in a federal court to enjoin the maintenance of a nuisance cannot be measured solely by the damage suffered by the complainant, *nor by the actual outlay of money which defendant would be required to make if the relief should be granted,* but the value of the right of which he is sought to be deprived is to be taken into consideration.

In the case of Louisville & N. R. Co. vs. Smith et al. (Circuit Court of Appeals, Fifth Circuit), 128 Fed. 1, the Court held that in a suit by a railroad company in a federal court against a number of land owners to enjoin threatened interference with its use of its right of way through their lands, the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of the defendants, constitutes the value of the amount in controversy for jurisdictional purposes.

[illegible] other cases enunciating the principle that in suits seeking injunctive relief, where the value of the property or right to be protected is greater than the value of the property about which the dispute originated and the value of the property or right to be protected, or the extent of the injury to be prevented, is in excess of the jurisdictional amount, jurisdiction exists, are:

Larabee vs. Dolley, 175 Fed. 365;
American Smelting & Refining Co. vs. Godfrey et al., 158 Fed. 225;
Rocky Mountain Bell Telephone Co. vs. Montana Federation of Labor, 156 Fed. 809;
Evenson vs. Spaulding, 150 Fed. 517;
Board of Trade vs. Cella Commission Co., 145 Fed. 28;
Riverside and A. Ry. Co. vs. City of Riverside, 118 Fed. 736, 743;
City of Hutchinson vs. Beckham, 118 Fed. 399;
Draper vs. Skerrett, 116 Fed. 206;
Humes vs. Ft. Smith, 93 Fed. 857;
Nashville, C. & St. L. Ry. Co. vs. McConnell et al., 82 Fed. 65;
Rainey vs. Herbert, 55 Fed. 443;
Texas & P. R. Co. vs. Kuteman, 54 Fed. 547.

In conclusion we state that we are convinced that the assignments of error are well taken. Complainant asserts a right, founded in law, to operate its plant, conduct its business, maintain its existing poles and wires and those to be erected and strung in the future, free from the wrongful and damaging interference of the defendant. Such right is alleged to be of a value in excess of the jurisdictional amount and is as broad as the complainant's right to operate its plant, conduct its business and maintain its poles and wires. The relief sought is a protection of such right with reference not only to the poles and wires of the complainant now existing but also with reference to those which may exist in the future, and in view of the principles announced in the foregoing cases, we are

led to the inevitable conclusion that the cost and expense to the defendant of removing the interfering poles does not determine the jurisdictional amount, but that the same is determined by the value of the rights of the complainant, to protect which it has sought the aid of a federal court.

We respectfully pray that the order and decree of dismissal entered by the District Court may be reversed.

CHARLES S. THOMAS,
GEORGE L. NYE,
WILLIAM P. MALBURN,
Solicitors for Appellant.

FILED
MAY 8 1915
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. [redacted] 38

THE GLENWOOD LIGHT AND WATER COMPANY,

Appellant,

vs.

THE MUTUAL LIGHT, HEAT AND POWER COMPANY,

Appellee.

On Appeal from the District Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT FOR APPELLEE.

JOHN T. BARNETT,
Solicitor for Appellee.

AVALANCHE PRINT, GLENWOOD SPRINGS, COLO.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

No. 315.

THE GLENWOOD LIGHT AND WATER COMPANY,

Appellant,

vs.

THE MUTUAL LIGHT, HEAT AND POWER COMPANY,

Appellee.

On Appeal from the District Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT FOR APPELLEE.

Counsel for appellant have correctly stated that there is but one question involved in this appeal: Is the value of the matter in dispute sufficient to give the Federal Court jurisdiction of the controversy? If the District Court was right in its conclusion that the value of the matter in dispute was "the cost to the defendant of removing its poles and wires in the streets and alleys where they conflicted or interfered with the poles and wires of complainant, and the replacement or reconstruction of said poles and wires in such position as to avoid conflict and interference," (transcript of record page 27, folio 51), then the ruling of the District Court in dismissing the bill for want of jurisdiction should be affirmed, for it is conceded that the cost to defendant of so removing and replacing its poles and wires would not amount to the sum of three thousand dollars ($3000)), (transcript of record page 28 folio 53).

Counsel for appellant are quite positive that the Court erred in holding that the matter in dispute was the removal of the poles and wires of defendant alleged to be in dangerous proximity to plaintiff's poles and wires and that the value of the matter in dispute was the cost to defendant of the removal of such poles and wires and their replacement or reconstruction in such position as to avoid conflict and interference, but they are not so positive as to what they consider the real matter in dispute or as to how its value is to be determined. In the certificate of jurisdictional question (transcript of record page 27) it is said:—"The complaint contended and still contends that such method was not the proper method of determining the jurisdictional amount, but that the amount in controversy necessary to give the Court jurisdiction of this cause was (1) the value of the property of complainant, or (2) the amount of damage caused to the complainant and its business and property, and to its right to maintain its poles and wires without interference or injury, or (3) the value of the poles and wires of defendant in the streets and alleys where they conflicted with and caused damage to the poles and wires of complainant." Thus it will be seen that appellant contends not for any one certain method of determining the amount in controversy, but contends for three different methods in the alternative. It was not contended that all of such methods were proper methods for the Court to adopt in determining whether a sufficient amount was in dispute to give jurisdiction but that some one of the three would furnish a proper method. Counsel ought not to complain very loudly of the Court's falure to adopt their theory of the case when they themselves are so uncertain and indefinite. They lose sight of the fact that the matter, the value of which determines the jurisdiction of the Court, must be a matter in dispute.

One party can't make a dispute. And appellant cannot give a Federal Court jurisdiction to hear and determine its controversy with appellee, by alleging that its plant is of the value of one hundred and fifty thousand dollars ($150,000). So far as the controversy in this case is concerned it is entirely immaterial whether appellant's plant was of the value of one hundred and fifty thousand dollars or one hundred and fifty dollars, since there is no claim that their plant is or will be destroyed or damaged. And the value of defendant's poles and wires alleged to be in dangerous proximity to the poles and wires of plaintiff is equally immaterial since plaintiff in its bill does not seek to destroy or damage such poles and wires, or in any way to deprive defendant of the ownership thereof, but only asks that they be removed to the other side of the alleys and streets and from dangerous proximity to plaintiff's poles and wires. But counsel for appellant in their brief virtually abandon the theory that the value of the matter in dispute may be determined by the value either of plaintiff's plant or of defendant's poles and wires and concentrate their argument and citation of authorities upon the second of their alternative contentions "the amount of damage caused to complainant and its business and property, and to its right to maintain its poles and wires without interference or injury."

The amount of damage to plaintiff and to its business and property may be passed with short notice as no damage is alleged to have accrued to plaintiff or to its business or property. But it is alleged that by reason of the close proximity of defendant's wires to those of plaintiff there is created a dangerous condition that increases the possibility or probability of damage to the property of plaintiff and its customers by fire caused by short circuits, and increases the danger to the lives of its customers and employees,

and increases the probability of plaintiff being subjected to suits for damage for injuries to its employees and customers, (transcript of record pages 18, 19 and 20). Thus it will be seen, that, accepting as true all the plaintiff has alleged, its damages are extremely problematical and are entirely too indefinite and uncertain to form the basis of an estimate of the value of the matter in dispute. So that, the only method seriously contended for by appellant of determining the amount in controversy is the measure of the amount of damage to plaintiff's right to maintain its poles and wires without interference or injury. As counsel express it in the conclusion of their brief (page 25):—"Complainant asserts a right, founded in law, to operate its plant, conduct its business, maintain its existing poles and wires and those to be erected and strung in the future, free from the wrongful and damaging interference of the defendant. Such right is alleged to be of a value in excess of the jurisdictional amount and is as broad as the complainant's right to operate its plant, conduct its business and maintain its poles and wires. The relief sought is a protection of such right with reference not only to the poles and wires of the complainant now existing but also with reference to those which may exist in the future."

No dispute exists between the parties as to the right of appellant to operate its plant, conduct its business, maintain its poles and wires free from any damaging interference of appellee. Appellee claims no right to interference in any way with appellant's poles and wires, or in any way with the conduct of appellant's business. Appellee merely denies that it has interfered or is interfering. No right is claimed by appellee to place its poles and wires in dangerous proximity to appellant's poles and wires, or where they would increase the danger or peril of appellant's operation of its plant, it

only denies that it has so placed them. It is conceded that if appellant can show that any of appellee's poles have been so placed and the wires so hung as to bring them into dangerous proximity to appellant's wires and to threaten injury or damage to appellant, then appellant is entitled to its remedy, requiring apellee to remove its poles and wires from such dangerous proximity, but its remedy is not within the jurisdiction of the Federal Courts.

In every case relied upon by appellant to sustain its proposition that the amount in dispute is to be determined by the value of its right to conduct its business without interference, it will be observed that plaintiff's right to conduct such business was disputed or else the defendant was asserting a right to do the acts complained of. In the case of Scott vs. McDonald 165 U. S., 107, plaintiff claimed the right to import into the State of South Carolina intoxicating liquors and this right was disputed by the State officials. In the case of McNeill vs. Southern RR Co., 202 U. S., 543, the railway company claimed the right to carry on interstate commerce in the State of North Carolina without interference from the corporation commission of the State while the corporation commission asserted its right to regulate the business of the railroad and to impose penalties for failure to comply with its regulations. The object of the suit was to determine the disputed right, and its value was the amount in dispute. In Hunt vs. N. Y. Cotton Exchange 205 U. S., 322 plaintiff's right to control the distribution and use of its quotations by requiring its customers to sign a certain kind of contract was asserted by plaintiff and disputed by defendant, and the object of the suit was to establish such right and its value was the amount in controversy. In the case of Bitterman vs. Louisville and Nashville RR Co., 207 U. S., 205 the railroad company claimed the right to sell

non-transferable reduced rate tickets and to prevent their transfer to and use by others than the original purchasers. The object of the suit was to establish and protect that right by preventing ticket scalpers from buying and selling such tickets. The matter in dispute between the company and the scalpers necessarily involved the right asserted by plaintiff and the amount in dispute was the value of such right. And so it will be found that in every case cited by appellant where the value of the business sought to be protected was held to be the measure of the amount in controversy to determine the question of jurisdiction either the right to conduct such business was disputed or the party complained of asserted the right to do some act injurious to or destructive of such business.

The "matter in dispute" as used in the statute means the matter or purpose for which the suit is in good faith brought. This Court in Smith vs. Adams 130 U. S., 167 at page 175 said:—"By matter in dispute is meant the subject of litigation, the matter upon which the action is brought and issue joined, and in relation to which, if the issue be one of fact, testimony is taken."

The "matter in dispute" in the case at bar is the removal of the alleged dangerous contact of the defendant's wires with those of plaintiff. And the amount or value of the matter in dispute is the cost to apellee of the removal of the alleged dangerous contact.

Miss. & M. R. Co. vs. Ward 67 U. S. (2 Black) 485.
American S. & R. Co., vs. Godfrey 158 Fed. 225.
Von Schoeder vs. Brittan 93 Fed. 9.
Jessup vs. Chicago & N. W. R. Co., 188 Fed. 931.

The "matter in dispute" the amount of which determines the jurisdiction of the federal courts, must be money or some property or other right that can be estimated and ascertained in money.

South Carolina vs. Seymour 153 U. S. 357.
Kurtz vs. Moffitt 115 U. S. 487, 498.
U. S. ex. rel. Holzendorf vs. Hay 194 U. S. 373, 376.

The allegation in the bill that the amount in controversy exceeds the sum of three thousand dollars is but a conclusion and is not a sufficient allegation of the value of the matter in controversy.

Fishback vs. Western U. T. Co., 161 U. S. 100.

We submit that the bill of complaint in this case clearly shows that the only subject of this action is to require the removal of certain of appellee's poles, so that the wires strung thereon will not come within dangerous proximity to appellant's wires. No other relief is sought and no other issue can be based upon the bill. And no other measure of value of the matter in dispute can be found in the case than the cost to apellee of removing and replacing such poles. We therefore ask that the decree of the lower court be affirmed.

JOHN T. BARNETT,
Solicitor for Appellee.